WORKMEN'S COMPENSATION

DURAND H. VAN DOREN

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WORKMEN'S COMPENSATION AND INSURANCE

Williams College

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WORKMEN'S COMPENSATION AND INSURANCE

BY

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TO MY

FATHER AND MOTHER

IN LOVE AND GRATITUDE

FOREWORD

The legislative tendency of to-day is unquestionably toward the rapid socialization of the state. In this movement, workmen's compensation laws and other statutory provisions for the insurance of the industrial hazard are playing an increasingly important part. By reason of the adoption of such measures, first in European countries, then in the colonial possessions of the great powers, and finally in the vast majority of the commonwealths which go to make up the United States of America, an impressive body of precedent and a wide divergence of views on matters of legislative policy have developed, to the study of which writers on economic and social questions are yearly devoting greater attention.

The present work is in answer to the demand for a brief critical presentation of the subject, as distinguished from an exhaustive and non-committal treatise. It was written in successful competition for the 1917 award of the David Ames Wells prize of $500, offered annually to seniors of Williams

College and graduates of not more than three years' standing, for the best essay on a subject in the field of political science assigned by a committee of the Faculty. The author is a graduate of the class of 1914. The essay method of treatment has been followed throughout, and matter of interest to the scholar and the legalist rather than the general reader is relegated to footnotes.

Every effort has been made to keep the text free from inaccuracies. Perfection in this regard, however, is hardly to be expected, especially in view of the mass of material through which the student of workmen's compensation is forced to wade, and the constant changes in the subject introduced by new legislation, court decisions, and administrative action. The most that the author dares to hope is that his unintentional transgressions will prove to have been few.

My thanks are due to the members of the Faculty Committee on the Wells Prize Contest, consisting of President Harry A. Garfield, Prof. Walter W. McLaren, and Prof. Theodore Clark Smith, and particularly to Prof. McLaren for valuable suggestions and unfailing sympathy and assistance.

D. H. V. D.

Washington, July, 1918.

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WORKMEN'S COMPENSATION AND INSURANCE

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CHAPTER I

UNDERLYING PRINCIPLES

A CAREFUL text-book writer has defined workmen's compensation acts as "enactments which embody the principle that the workman is entitled to compensation for injuries received in the course of his employment." [1] Accepting this description as adequate for the purposes of an introductory chapter, we are led to ask: "Where and when did this principle first gain credence; and why was legislation necessary to engraft it on our law?" Until these questions are answered, an intelligent study of workmen's compensation as it exists to-day is impossible.

For centuries before the modern legislation with which we are to deal, the law had treated contracts

[1] Boyd, Workmen's Compensation, p. 205.

of employment as purely personal agreements (the interest of the public in them being overlooked); and controversies arising out of them had been disposed of by the courts with an eye chiefly to mulcting the party at fault for the benefit of the party injured. Especially has this been true of suits by the workman to recover damages from his employer for injuries suffered in the course of the employment. The question put by the law in such cases has long been: "Was the injury due to the positive fault or culpable negligence of the employer?" Unless this query were answered in the affirmative, damages or compensation for the injury could not be recovered, and the unfortunate workman was left to his fate. Such was the common law of negligence.

It will readily be conceded that this narrow code, even if calculated to work substantial justice in the rare cases where the relation of master and servant was a purely personal and intimate one, is wholly unadapted to the conditions of modern industry, where factory labor is the rule and personal contact of employer and employed is the exception; yet it has been made even harsher and more anachronistic, in countries following the English law, by the importation of three peculiar doctrines.

These are known as the contributory negligence rule, the fellow-servant rule, and the doctrine of assumption of risk.

The contributory negligence rule is not peculiar to the law of master and servant, but is broadly applicable to all cases of accidental injury. Briefly, it is that if the party injured has by his negligence contributed to the risk which occasioned his injury, he cannot recover compensation for such injury in an action against the carrier, master, or other negligent party. Contributory negligence of the injured workman is a perfect defense for the employer in such suits.[2] The test of whether it exists in a particular case has been well formulated in a leading Indiana decision: "If the risk is so great and immediately threatening that a person of ordinary prudence, under all the circumstances, would not take it, contributory negligence is established. If the risk is not so great and immediately threatening but that a person of ordinary prudence, under all the circumstances, would take it, contributory negligence is not established." [3]

The fellow-servant rule, or the "doctrine of common employment," as the English call it, is said to

[2] Burdick, Law of Torts (3d Ed.), p. 198.
[3] Davis Coal Co. v. Poland (1901), 158 Ind. 607, 62 N. E. 492.

have originated in the case of Priestley v. Fowler [4] in 1837; though it has been pointed out that that case is authority for no such broad proposition.[5] But whatever its origin, it has taken a mighty hold on English law, and is the prevailing doctrine in jurisdictions where it has not been abolished by statute.[6] The general rule has been stated as follows: "One who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of his employment." [7] Such a proposition will be seen to be a natural outcome of the old theory that contracts of employment are personal contracts, under which the master assumes no responsibility except for his own personal acts or omissions; but it is grotesquely inapplicable to modern industrial conditions, where the workman often never sees his real employer. It is true that the rule has been modified in some jurisdictions so as to give the workman a right of action against the employer in cases where the fel-

[4] 3 M. & W. 1, 49 R. R. 495 (1837).

[5] Burdick (supra), p. 202; also Pease, J. G., in 15 Columbia Law Review, at p. 509. But see Dawbarn, Employers' Liability and Workmen's Compensation (4th Ed.), at p. 2; and Boyd, Workmen's Compensation, at p. 26, for the conventional view of the origin of the fellow-servant rule.

[6] Burdick (supra), p. 203.

[7] Randall v. B. & O. Ry (1883), 109 U. S. 478, 483.

low-servant's negligence can reasonably be imputed to the master on the theory that the former is so completely clothed with the powers and discretion which the master could exercise if present as to be the master's *alter ego* rather than a true fellow-servant.[8] But even so the rule serves to defeat recovery in that large class of cases where the fellow-servant's negligence, though not imputable to the master personally, is clearly a risk inherent in the employment rather than a mere independent tort of the fellow-servant himself. Speaking of the rule, Augustine Birrell has said: "The doctrine of common employment was only invented in 1837. Lord Abinger planted it, Baron Alderson watered it, and the devil gave it increase." [9]

The doctrine of assumption of risk is related to the fellow-servant rule, and really embraces the latter. "Under this principle every risk which an employment involves after the master has done everything he is bound to do for the purpose of securing the safety of his servants (including the employment of other servants) is assumed, as a

[8] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.). p. 5.

[9] Quoted from The (London) Times of May 18, 1897, in an article on Workmen's Compensation and the Theory of Professional Risk, by F. P. Walton in 11 Columbia Law Review, pp. 36–50, at pp. 38–39.

matter of law, by each of those servants." [10] And the broad proposition has been stated by another writer thus: "When a man enters another's employ he does so with his eyes open, and with a knowledge of the risks incidental to it, including those due to the negligence of fellow-servants, and those he contracts to take, e. g., a miner or a sailor, whose occupations of their very nature are dangerous." [11] The doctrine was first authoritatively laid down in 1842 by Chief Justice Shaw of Massachusetts, in a famous case.[12]

It is true that, to offset the several defenses which the employer had to an action by the workman for injury suffered in the course of his employment, the common-law laid certain duties upon the employer, breach of which was considered negligence or fault on his part. These duties were: (1) to employ suitable fellow-servants; (2) to establish and promulgate proper rules; (3) to provide a safe place to work; (4) to furnish safe appliances; (5) to warn youthful and inexperienced servants of the dangers of the employment. But

[10] Boyd, Workmen's Compensation, p. 5.

[11] Dawbarn, Employers' Liability and Workmen's Compensation (4th Ed), p. 2.

[12] Farwell v. Boston, etc., R. Co., 4 Met. (Mass.) 49; see also Boyd, Workmen's Compensation, at p. 26.

these duties were far from nullifying the special defenses we have discussed.[13] Thus, though the master was under a duty to employ suitable fellow-servants, he discharged himself of all responsibility by exercising reasonable care in their selection; if, after such due care, an injury happened to a servant through the unfitness or negligence of a fellow-servant, the master was not liable therefor.

It will be seen, then, that the common-law of England and the United States rested the employers' liability to the workman for injuries to the latter in the course of his employment solely on principles of tort. The workman could recover compensation from the employer only when he could clearly establish that it was the latter's fault that the injury occurred; and the number of ways in which such responsibility could be shifted I have already indicated. When the accident was due to the inherent hazards of the employment, to the act of God, or where the blame could not be fixed, the employer was not liable.[14]

This review of the state of the common-law in

[13] Burdick, Law of Torts (3d Ed.), pp. 184–197; also Boyd, Workmen's Compensation, p. 2.

[14] Boyd, Workmen's Compensation, p. 6. These rules are especially unjust in view of modern impersonal relations between employer and employed. Commons and Andrews, Principles of Labor Legislation, pp. 357–358.

England and America prior to the passage of the workmen's compensation acts puts us in a fair way to answer one of our questions: "Why was legislation necessary to engraft the principle of workmen's compensation on our law?" Simply because the common law and the modern acts proceed on a wholly different ethical, economic and legal basis. The legislator of to-day rejects the narrow view that the problem of industrial accidents is one wholly between the parties to the contract of employment; and hints that its true solution is to be found in saddling on the industry, as one of the necessary incidents of conducting it, the expense of compensating its injured employees regardless of the varying degrees of negligence of the parties. Workmen's Compensation presumes a *right* in the injured laborer to compensation for injuries received in the course of his employment; but this right is no more personal to the laborer than is the duty to pay personal to the employer. In a given case, the workman's negligence may be inexcusable, the employer's conduct exemplary; but because in the long run it is better for the industry to bear the brunt of industrial accidents, because individual adjudication of such cases involves great expense, delay, and uncertainty, the supporters of

the modern legislation have insisted that the law shall make "the assumption, in all cases, that neither party was guilty of negligence and that the injury was the inevitable result of the occupation in which the employee was engaged." [15]

The reader must not, however, assume that the principle of workmen's compensation, which has been thus broadly stated, operates to its fullest extent in all those jurisdictions in which it has been adopted. Indeed, it has been pointed out that in none of the American states in which a modern act is in force, does the law cover all employments; and in all there are limitations in the causes and results of injuries for which compensation will be granted.[16] Most statutes refuse compensation when the accident is due to the willful act of the employee; [17] and some make the same rule in the case of intoxication.[18] But these and other exceptions must not be taken to impeach the theory on which all these acts are based; which is that it is in

[15] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.), p. 6.

[16] W. C. Fisher in Quarterly Journal of Economics, vol. XXX, pp. 22–23. There is a marked tendency, however, to do away with these limitations. Rhodes, Workmen's Compensation, p. 135.

[17] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.), pp. 6–7.

[18] Bradbury (supra), p. 7; see also New Jersey statute (P. L. 1911, p. 134) Section 2, paragraph 7.

the interest of the state and its citizens, to have "the portion of the cost of furnishing products and services which is represented by the loss of time through disabilities caused by accidents arising out of the occupation, and by death from such accidents of persons engaged in the occupation," borne in the first instance by the employer and ultimately by the consuming public in the form of increased prices, rather than by the injured workmen themselves.[19]

As has been shown, the distinction between the two legal systems is a fundamental one; the common-law of negligence raising the question of comparative fault, while the workmen's compensation acts waive that question entirely, and rest on the broad proposition that public policy requires that the industry bear the burden of the accidents incidental to it. But, clear as is the distinction in principle, the terms used to describe the two theories have been ambiguous and confusing. "Employers' Liability" is the antithesis of "Workmen's Compensation"; and the former should be used to denote the common law system, either in its purity or modified in its details but not its principles by

[19] See Dawson, Miles Menander, on The Constitutionality of Workmen's Compensation and Compulsory Insurance Laws, in Case and Comment, vol. 22, at p. 278 (September, 1915).

"Employers' Liability laws," as distinct from the innovations of the statutes we are discussing.[20] Notwithstanding, the two terms have not infrequently been used interchangeably. The courts themselves have taken notice of these inconsistencies, however, and in at least one instance have suggested a change to the more accurate term in describing a statute.

Another phrase which is often used and is apt to confuse the unwary is "State Insurance." By State Insurance Laws are meant simply those workmen's compensation laws, or statutes of even broader application, which follow the German plan of providing compensation for disabled workers by means of state-managed insurance funds, to which the employers (and sometimes the workmen themselves) contribute in the form of premiums. This is a form of workmen's compensation apparently increasing in popularity, though meeting with the organized opposition of the private insurance companies.[21]

Enough has been said to show that a new prophet

[20] Bradbury, Workmen's Compensation and State Insurance Law (1st Ed.), at p. ix of the Introduction; Rhodes, Workmen's Compensation, p 3. See also Gregutis v. Waclark Wire Works, 91 Atl. (N. J.) 98, for judicial view of distinction.

[21] See current comment in The Weekly Underwriter, published at

has arisen in Israel; that the attitude of our forefathers towards labor, and more especially towards the problem of industrial accidents, is not the attitude of the rising generation. But a theory is not sound merely because it is new. How solid is the economic basis on which it rests?

To begin with, the supporters of the workmen's compensation principle insist that accidents are an inevitable incident of modern industry. In the long run, there will be a "more or less stable aggregate of loss and damage occasioned by industrial accidents; and this loss or damage is as much a part of the cost of the commodity produced as destruction of material, wear and tear on machinery, etc." [22] In reply to the contention that "the workman can get relief by suing his employer," the advocates of the new legislation point to the results of actual investigations, like that of the German Government commission of 1887, whose careful statistics show that out of every 100 serious accidents 43 are such as no care on the part of the employer could have prevented.[23] In those 43 cases,

80 Maiden Lane, N. Y. The Workmen's Compensation Publicity Bureau at the same address is avowedly run in the interests of private insurance.

[22] Frankel and Dawson, Workingmen's Insurance in Europe, p. 9.

[23] 11 Columbia Law Review, p. 40, n. 9.

then, the law of negligence, even under the most liberal of employers' liability acts, would give no relief; and the burden would be thrown upon those least able to bear it—the injured workmen themselves. It need hardly be added that this means, in the last analysis, that the support of the disabled laborer and his dependents is thrust upon the general community in the form of charity.[24]

Let us put aside for the moment whatever feeling of pity for the unfortunate workman and his family may be stirred in us by the situation thus presented, and consider it simply as an economic problem. In a given industry—say that of mining for coal—the risk is unusually great. This is not because of negligence on the part of the employers, who, we will presume, have spent much money and put a great deal of thought into safety devices; but because mining is an inherently dangerous occupation. Every year a great number of serious accidents occur; the injured miners, and the representatives of those who are killed, are constantly bringing actions against the mining companies. Sometimes big verdicts are recovered; but oftenest it is impossible to prove that the employers were negligent, and only the lawyers profit. The situation is pitiful; the

[24] Frankel and Dawson, Workingmen's Insurance in Europe, p. 9.

families of disabled workmen struggle on in dire poverty, or drift to the poor-farms, where they are a continuous expense to township and county.

This picture represents more than a social injustice; it reveals an economic fallacy. That large proportion of accidents which are inseparable from the employment, yet for which the law permits no recovery against the employer, constitutes one of the normal incidents in the production of coal; and a sane economic policy dictates the assumption of the expense of these accidents, not by the impoverished workman, not by the public charity to which the workman eventually turns, but by the employers of that industry in the first instance, and eventually by the consumer of the coal in the form of increased prices for that commodity. It is for the consumer of the coal, in the final analysis, that the miner toils and subjects himself to danger; and since it is the consumer who has set the industry in motion, it is but right that when he comes to pay for the product of the miner's labor he shall include in the purchase-price enough to compensate the miner for the dangers he has undergone and the injuries he has suffered. Yet for many years the mining communities, instead of the particular group

which benefits by the production of the coal, have had to bear the burden of the accidents incidental to its production, in the form of the expense of litigation concerning these accidents, the care of the victims, and the many evils growing out of the resulting distress and pauperism.[25]

Unsound in principle, the old law did not work out well in practice. In a few cases, injured workmen excited the sympathy of the jury and recovered scandalously large verdicts; but a vast majority of accidents went wholly uncompensated or were met with inadequate payments.[26] It has been estimated that the common-law remedy furnished compensation of any kind in not more than 12 per cent. of the cases of injuries to employees; and even in those few cases of recovery, the amount paid averaged scarcely one-fifth of what is deemed adequate.[27] In Germany, before the adoption of the compulsory insurance laws, the percentage of cases of accidents to employees in which compensation was awarded was even smaller, being barely ten per cent.[28] That these percentages do not repre-

[25] See Dawson, Miles Menander, in Case and Comment, vol. 22, p. 278.

[26] Frankel and Dawson, Workingmen's Insurance in Europe, p. 7.

[27] Boyd, Workmen's Compensation, p. 54.

[28] Ibid., p. 74 .

sent the ratio of meritorious to undeserving cases, even approximately, goes without saying.

Capitalists and large employers to-day have joined the labor element in welcoming the compensation principle.[29] Undoubtedly the aggregate yearly payments under the compensation laws are greater than formerly under the old slipshod system; but the terror of the "big verdict" is gone. Another abomination done away with by the acts is the necessity of paying expensive attorneys and claim agents to fight the claims—an item often of greater magnitude than the whole amount paid as damages.[30]

But whether employers are pleased or not, it is likely that they will have to submit to workmen's compensation laws, which, after long delay, have come like a whirlwind upon the United States, most of the states and territories having adopted the principle since 1911.[31] And as the legislation, and the industries to which it applies, gradually undergo the changes necessary to the process of mutual adaptation, even the most stubborn of the oppo-

[29] Senate Document No. 338, 62d Cong., 2d Sess., pp. 551, 1378.

[30] Boyd, Workmen's Compensation, p. 60.

[31] For texts of the laws passed up to the end of 1916, see Honnold, Workmen's Compensation, vol. 2. See also digests and other publications of the Workmen's Compensation Publicity Bureau, 80 Maiden Lane, New York City.

nents of the idea will be compelled grudgingly to admit, as did a successful and conservative banker friend of mine, that "after all, it's a better solution of the labor problem than the old one."

CHAPTER II

THE RISE OF WORKMEN'S COMPENSATION

THE theory of workmen's compensation is such a newcomer to the United States that some study of its history, of how, why and where it came to be, is essential. To an account of the rise of the compensation principle, and a description of the form it has taken in foreign countries, and more especially in Germany and England, this chapter is devoted.

Switzerland was the first country to declare that for accidents in certain employments the employer was to be liable without proof of fault;[1] but the German Industrial Insurance Act of 1884 is conceded to have been the first modern compensation law,[2] and on the German system most subsequent

[1] 11 Columbia Law Review, p. 36. See also Fourth Special Report of the Commissioner of Labor, edited by John Graham Brooks (1893), p. 354; and Frankel and Dawson, Workingmen's Insurance in Europe, p. 74. The Swiss law of 1881 "made factory proprietors liable without fault for accidental injuries to their employees," and included among such injuries "diseases caused by such poisonous substances as should be specified by the Federal Council." 65 Univ. of Penn. Law Review, 516–517 (April, 1917).

[2] Bradbury, Workmen's Compensation and State Insurance Law (1st Ed., 1912), p. xii of Introduction.

enactments have in some degree been patterned.[3] It must not be supposed, however, that in Germany or anywhere else the compensation principle came into being by spontaneous generation; its ultimate adoption was the culmination of a long series of legislative experiments along similar lines, which in turn were the result of gradual advances in the field of economic philosophy.

The philosophic influences which have molded modern German labor legislation are especially important. They are very much older than such legislation itself, going back at least to Hegel, Fichte and Sismondi, whose theories were the inspiration respectively of Marx, Lasalle and Winkelblech, the three Socialistic thinkers with whom the rise of the principle of compulsory workmen's insurance is indissolubly associated. The theory of the duty of the state towards the working class, which Fichte, writing at the close of the eighteenth century, expounded with such eloquence, was taken up and expanded by Sismondi twenty years later; and it was the latter's disciple, Professor Winkelblech (Karlo Marlo), who first conceived the idea of state insurance in Germany. Another Socialist, Dr. Schaeffle, has been called the father of that

[3] 11 Columbia Law Review, p. 37.

principle; and it was unquestionably the sudden increase in the Socialistic vote after the Franco-Prussian War that led Bismarck to adopt the compulsory insurance idea.[4]

The Prussian Act of November 3, 1838, had contained the elements of an employers' liability law of narrow application. It provided, in substance, that railway companies should be liable to both employees and passengers for injuries sustained from the operation of the trains; but it also expressly permitted the companies to set up in defense either that the accident had been caused by the negligence of the injured party, or that it was due to an act of God.[5] The statute was indicative of a broader attitude towards accidents to employees than that characteristic of the common law of negligence and fault; but there was as yet no sign of acceptance of the compensation principle.

Labor problems, however, continued to occupy the attention of German legislators. In 1854, certain classes of employers in Prussia were compelled

[4] Fourth Special Report (see footnote 1), pp. 19–22, 27. Mr. Brooks, the author of the report, makes, in Chapter 1, a thorough examination into the philosophic basis of the compensation principle. See also Rhodes, Workmen's Compensation, pp. 41–45.

[5] Boyd, Workmen's Compensation, p. 26. Mr. Boyd has an excellent historical summary of German legislation in this book, on which the writer has freely drawn for information.

by statute to contribute one-half of the subscriptions to the fund of the sick associations formed according to local statutes; and Brunswick, Mecklenburg and Saxony went even further in requiring that all employers should be members of some kind of mutual sick association.[6] The earlier Prussian laws, however, do not seem to have been very effective; as, in 1876, when the law relating to friendly and active societies was passed, barely one-half of those employed in mines and other industries coming within the law were insured in the Sickness, Relief and Burial Societies provided for.[7]

The employers' liability act of 1871, for united Germany, related only to mines, railways, and a few other industries, and made employers liable for death or accident proved to be directly or indirectly the fault of the employer. Assumption of risk and the fellow-servant rules were done away with by this statute, which, however, caused so much bitterness and involved so many delays in the administration of justice that it must be set down as a failure.[8]

The voluntary insurance act of 1876, to which I

[6] Fourth Special Report (supra), p. 35; Boyd (supra), pp. 26–27. See also Willoughby, Workingmen's Insurance, pp. 33–34.

[7] Boyd, Workmen's Compensation, p. 27.

[8] Ibid., pp. 28, 1180–1181.

have already referred, also proved a failure, as a result of that industrial selfishness which is the bane of all such legislation.[9] The need of stronger measures, which in operation would not lay the burden on conscientious employers and exempt their less altruistic competitors, was pressing; and Bismarck set himself to the solution of this problem with characteristic energy. The compulsory insurance acts of 1883–1889, heralded by an Imperial message to the Reichstag on November 17, 1881, were the results of his labors.

The scheme of these laws was novel and comprehensive. By the Sick Insurance Act of June 15, 1883, insurance was made compulsory as to workmen of an earning capacity up to 2,000 marks a year in a large class of industries, and voluntary as to the exempted workmen, officials and servants. It was to be carried out by means of local associations, established by trade guilds, townships, factories, or other industrial units; these were mutual, self-administered organizations, to whose insurance funds workmen and employers contributed in a ratio of two to one. The relief to which the insured were entitled consisted in free medical attendance from the beginning of the illness, including medicines,

[9] Fourth Special Report (supra), p. 46.

bandages, etc., and a sick pay equal to one-half of the insured's wages for a limited period, first set at 13 weeks. In addition, special hospital treatment was provided for in particular cases, and burial money in the case of death.[10]

Accident Insurance (as distinguished from Sick Insurance) was covered by the following enactments: (1) the "fundamental law," often referred to as the first modern compensation act, of July 6, 1884, which applied to mines, quarries, excavations, factories, and in general the handicrafts using machines and some underground building; (2) the "extension law," extending the principle of the former act to the transport trades within the country, including the post, telegraph, army and navy; (3) the "agricultural law" of May 5, 1886, for Agriculture and Forestry; (4) the "building law" of July 11, 1887, for building trades so far not insured; (5) the Marine Law of July 13, 1887, for Navigation.

It will be seen that the general plan of this legislation was to provide a special set of rules adapted to each particular province of insurance. As revised in 1900, it consisted of four separate laws,

[10] Boyd, Workmen's Compensation, pp. 1175–1180; Willoughby, Workingmen's Insurance, p. 41.

relating to (1) Industry; (2) Agriculture and Forestry; (3) Building; (4) Navigation. The scheme is carried out, much as in the case of the sickness insurance, "under the guarantee of the Empire, on the mutual system, by the employers united in trade associations, which may embrace all the several branches of industry in certain districts or in the whole empire."[11] The provisions of the law relating to Industry are of primary interest in our study, and will first be briefly considered.

The Act is made applicable to employers and officials whose incomes are not above 2,000 marks per annum, as well as to workers in mines, quarries, factories, etc.; and a number of other classes may be included by the peculiar law of the particular German state or may voluntarily join the insurance. Workmen and employers contribute to the fund, which is used for the payment of compensation as in the case of the Sickness insurance.

From the beginning of the fourteenth week after the occurrence of an accident incurred in the course of the employment (when the sickness insurance would expire) the injured workman, if totally disabled, is given free medical attendance and a pension equal to two-thirds of his yearly earnings; if

[11] Boyd (supra), pp. 1182–1183.

only partially disabled, the pension is only partial.[12] Burial money and a pension for the family in the case of death are also provided for; and the normal payments mentioned above are likely to be increased to a full pension or given in a lump sum if the total disability takes the form of absolute helplessness, or the injury was caused intentionally by the employer.[13]

Some other points of the plan are worthy of notice. For example, during the first thirteen weeks of disability, known as the *waiting period,* the employer was liable for the injured man's support in case the sick associations failed to provide for him; though this has now been altered.[14] From the decision of the trade association on the validity of a claim under the act, there was an appeal, originally to the imperial bureau, and, after 1901, to a special arbitration court.[15] And since the trade associations have a decided interest in diminishing the number of accidents, the law confers on them the important privilege of prescribing safety regu-

[12] Fourth Special Report (supra), pp. 90–91; Willoughby (supra), p. 60; Dawson, Social Insurance in Germany, p. 113.

[13] Boyd (supra), pp. 1184–1185; Willoughby (supra), p. 60.

[14] Boyd (supra), p. 1185.

[15] Ibid. Mr. Brooks, in the Fourth Special Report (supra), writing in 1893, says that one-sixth of the decisions of the trade associations were appealed to the imperial bureau (at p. 93).

lations, infringements of which they may punish by higher assessments on employers or fines on workmen.[16]

The Agricultural Insurance Law, which applies to Forestry as well, differs somewhat from the Industrial Insurance Law in its methods of operation. The agricultural trade associations are organized by territorial districts, made to coincide with communal or provincial boundaries. These bodies, at their assemblies, levy contributions for the insurance fund, on the basis of taxes; and the compensation paid, except in the cases of skilled workmen or managing officials, is based on the average rate of wage for agricultural laborers, rather than actual earning power. Furthermore, during the "waiting-time," the parish, instead of the employer, is required to make preliminary provision for the injured laborer.

Under the Building Trades Accident Insurance Law and the Marine Accident Insurance Law the compensation is administered by "insurance institutions" established as appendages to the several associations. In the case of small marine enterprises, a special "Insurance Institution" is provided, to which masters of small craft employing regu-

[16] Fourth Special Report (supra), p. 95.

larly not more than two wage-workers are subject; the compensations being raised by premiums and contributed to by the larger parish unions.[17]

Another form of state insurance provided for in Germany, and important in this connection because it forms one of the chief branches of the consolidating act of 1911, is Invalidity and Old Age Insurance. It was first established by a statute approved on June 22, 1889,[18] and was replaced ten years later, after about eight and one-half years of actual operation, by the act of July 13, 1899. Persons working for wages in any branch of trade, managing officials such as foremen and engineers, clerks, apprentices, teachers and tutors, and some other employees, are compelled to insure; masters employing only one or two workmen, employees with yearly earnings in excess of 2,000 marks and less than 3,000, and those who work only occasionally or for maintenance, are allowed to join the insurance voluntarily. The object of the law is to give the insured a legal claim to a pension for invalidity or old age. Its benefits may be invoked by every insured person who is permanently disabled, irre-

[17] Boyd, Workmen's Compensation, p. 1193.

[18] Fourth Special Report (supra), p. 116; Willoughby (supra), p. 36; Dawson, Social Insurance in Germany, p. 19.

spective of age; and without proof of disability by insured persons who have completed their seventieth year. Contributions to the fund are furnished by the Empire, the employers and the employed, jointly. Pensions are administered by special Insurance Institutions, which are corporations whose responsibility is guaranteed by the state.[19] The amounts are considerably smaller than the compensation provided for by the accident insurance laws, but there is a good explanation of this in the fact that gradual decline in bodily vigor is an inevitable occurrence against which every prudent man is bound to provide, while sudden industrial accidents upset all calculations.[20]

The three great branches of state insurance which we have described—Sickness, Accident, and Invalidity—were consolidated into the German Workmen's Insurance Code by the act of July 19, 1911. This statute is essentially a codification, and carries out the scheme of the individual acts even to the retention of separate administrative bodies to conduct the three branches. "Survivors' Insurance" to protect widows and orphans is a new feature; so is the introduction of a series of government offices to supervise the insurance organ-

[19] Boyd (supra), p. 1200. [20] Ibid., p. 1203.

izations; but in the main the changes have been in the nature of a harmonizing and extension of the provisions of the former acts rather than the introduction of new matter. The act represents the existing law in the Empire on the subject; and it may be mentioned, as characteristic of German thoroughness and genius for detail, that a translation of its provisions fills nearly 300 pages of fine print in a generous American law-book.[21]

The German Compulsory State Insurance Law has been called "the boldest experiment in social legislation ever attempted." It represents the most complete development yet attained along the line of Workingmen's Insurance, and has served as a model for legislation in several American states. In the writer's opinion, it comes nearer to the ideal law than any in force elsewhere. But state insurance is too near state socialism to meet with uni-

[21] Pages 1227–1500 in Mr. Boyd's treatise. An excellent review of the statistics available just before the outbreak of the Great War, with deductions therefrom as to the desirability of the German system, is to be found in The Market World and Chronicle, vol. 93, pp. 814–819 (June 27, 1914). The author of the article comes to the conclusion that German Industrial Insurance is not actuarially solvent owing to insufficient provision for reserves; and also comments on the "pension hysteria" resulting from the too liberal awards made prior to 1908. Neither of these criticisms, in the opinion of the present writer, condemns the state insurance project, though indicating possible improvements in details.

versal acceptance. Though it cannot but be recognized that the principle of workmen's compensation —of liability of the employer for injuries to the employee without regard to comparative negligence —can only be made thoroughly practical in operation by the use of some system of insurance, many commonwealths have preferred to leave this problem to be worked out by voluntary associations. Compensation laws in these jurisdictions affirm the principle of the right of the injured workman to some indemnity from the employer, prescribe the amounts to be paid and the method of administration, but are silent as to how employers and workmen shall contrive that the compensation shall always be forthcoming without undue shock to the financial stability of the industry. The typical statute of this nature, and one which, like the German law, has served as a model for many American acts, is that now in operation in England.

In England, as in Germany, the development of the workmen's compensation principle was gradual. The fellow-servant rule, though well established after Priestley v. Fowler,[22] had not been popularly supposed to extend to cases where the fellow-workman was of a higher rank and prac-

[22] 3 M. & W. 1 (1837).

tically acting in the place of the master. But in Wilson v. Merry, in 1868, the House of Lords pushed the doctrine to its utmost limits. In that case the plaintiff's son, a miner, was killed by an explosion of fire-damp which had accumulated owing to defects in a staging which had been erected by the defendant's superintendent, a competent man. In holding that the plaintiff could not recover, Lord Cranworth said: "Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority." [23]

After this case, the imperative necessity of some statutory modification of the common-law became apparent. A rule so narrow would prevent recovery in most cases of servants of corporations, since the negligence would almost of necessity be that of another servant of the corporate entity. And it was really to undo the mischief caused by the sweeping language used in Wilson v. Merry that the Employers' Liability Act of 1880 was passed.[24]

The Act of 1880, like the subsequent broader statute of 1897, was the work of Joseph Chamber-

[23] L. R. 1 H. L. (Scotch) 326 (1868). At p. 334.

[24] Dawbarn, Employers' Liability and Workmen's Compensation (4th Ed.), p. 5.

lain.[25] Framed, as it was, with an eye to securing the political support of both manufacturers and workmen, it is in no sense a radical measure. It creates no new cause of action, but leaves the workman to sue for damages as before; and in such a suit the employer is permitted to set up the same defenses as at common-law, except that the accident was due to the negligence of a fellow-servant. This abolition of the "defense of common employment," or (as we have termed it) the fellow-servant rule, is the one outstanding feature of the whole piece of legislation.[26]

The Employers' Liability Act unquestionably brought about an improvement in the labor situation in England. But it had the inherent weaknesses of a measure of narrow application. To begin with, it covered only a limited range of employments, and these were arbitrarily selected. Against purely collateral negligence of a workman in the same grade of employment, it did not pro-

[25] For the source of this and other historical data with regard to the development of the Workmen's Compensation principle in England, see the comprehensive work of Mr. Dawbarn (supra), and an excellent article by J. G. Pease in 15 Columbia Law Review 509–523 (June, 1915) entitled "An English Workman's Remedies for Injuries Received in the Course of His Employment, at Common-law and by Statute."

[26] Tillyard, Industrial Law, p. 104.

tect. And the causes of injury to which the Act applied were specified with too great precision; a workman with a meritorious cause of action was apt to fail through mere inability to bring himself within the strict provisions of the act.[27] These defects, and the growing popular demand for some simple scheme by which the workman's claims could be settled without resort to prolonged and expensive litigation, led to the government's definitely committing itself to workmen's compensation in 1897.

The new law bound employers in a wide range of industries to pay to such of their workmen as should be injured by an accident arising out of and in the course of the employment, compensation upon a scale fixed by the act. Disputes as to the amount of compensation payable were to be submitted to arbitration, with a right of appeal to the higher courts. The language of the act was simple and direct; but that very unlawyer-like simplicity was the cause of much confusion, and the reports are full of cases in which the legal significance of apparently lucid phrases is discussed at length.[28]

Several amending acts followed the passage of the Act of 1897, and finally, in 1906, it was re-

[27] Pease (see footnote 25), pp. 514–515.
[28] Pease (supra), p. 516.

pealed, and its main provisions reënacted with various amendments extending its benefits to classes of workmen not covered by the preceding statutes. It will be well worth while to consider briefly the main provisions of this act of 1906, which has been so widely discussed and so frequently copied.

To begin with, the Act makes the right to compensation a statutory incident of the contract of service; in a sense, it puts the master in the position of an insurer against accident, though payment of premiums and other indicia of insurance are lacking. The master's negligence is wholly immaterial.[29]

For practical purposes, the statute is divided into three parts: (1) the Act itself, which deals mainly with the question of liability for compensation; (2) Schedule I, which prescribes how the compensation is to be assessed and disposed of; and (3) Schedule II, dealing with the procedure to be adopted.[30] The first of these topics is of infinitely the greatest importance for the purposes of our study.

A very wide range of employments is covered by the Act. Any person who has entered into or works under a contract of service or apprentice-

29 Pease (supra), p. 517.
30 Dawbarn (supra), pp. 85–86.

ship, express or implied, either by way of manual labor, or any sort of labor attended with a remuneration of less than £250 a year, is entitled to claim its benefits; save that a few groups, such as the police, some casual workers, and workers who happen to be members of the employer's family, are excluded from its operation.[31] Compensation, normally in the form of a weekly sum during the period of total or partial incapacity, is required to be paid whenever "personal injury" by accident arising out of and in the course of the employment is caused to a workman.[32] In the case of death from such an accident, the workman's dependents are entitled to a sum proportioned to his earnings, but not in excess of £300.[33]

The master's liability to pay compensation under the Act of 1906 arises whenever the claimant, a "workman" within the meaning of the Act, has suffered injury "by accident arising out of and in the course of" his employment. Clearly, then, the injury, to be one under this statute, must: (1) be by an accident; (2) arise out of the employment; (3)

[31] Pease (supra); also Boyd, Workmen's Compensation, p. 1131. "Workman" is defined by Section XIII of the Act, which limits the word as indicated above; special limitations on the application of the Act are also to be found in Sections VII and IX.

[32] Section I, subdivision 1 of the Act of 1906 (6 Ed. 7, ch. 58).

[33] Pease (supra), p. 516.

arise in the course of the employment. And if any one of these tests is not met, the claimant fails to establish his right to compensation. These phrases were the subject of much argument and speculation in the infancy of the act, but their meaning is now pretty definitely settled.[34]

The word "accident" has been construed with great liberality by the English courts. The definition most generally accepted is that of Lord Macnaghten in Fenton v. Thorley & Company, Ltd.,[35] to the effect that "accident" is used (in the act of 1897) "in the ordinary and popular sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." It follows that mishaps caused by the negligence of the injured man, as well as those for which no one can be held responsible, may constitute injury by accident; and so it was held in the Thorley case. Even where the injury is designedly caused by some person other than the injured man, it is an accident as to the victim, who neither designed nor expected it; and such was the opinion of the House of Lords in the case of Trim Joint District School v. Kelly,[36] where the death of a

[34] Pease (supra), p. 517.
[35] (1903) Appeals Cases 443, at p. 448.
[36] (1914) A. C. 667.

schoolmaster caused by deliberate and intentional violence on the part of his pupils was held an "accident." But an accident must be something fortuitious, some mishap occurring at a definite time and place; so injuries to the health resulting from ordinary wear and tear of work, or a gradual undermining of the constitution due to the nature of a man's occupation, do not come within the category of accident.[37]

The Act of 1906, however, is not confined to the field of "accidental injury" as that phrase has been interpreted by the courts. Section VIII extends its benefits to cases of death or disablement by certain specified industrial diseases, to which workers in particular processes are peculiarly liable. In the Schedule attached to the Act these industrial diseases are specified as anthrax, lead, mercury, phosphorus and arsenic poisoning and their sequelæ, and ankylostomiasis; but the power given by subsection (c) to the Secretary of State to extend this list has been repeatedly exercised.[38] The arbitrary specification of these diseases as "accidental" causes of injury does not prevent a claimant suffering from a disease not specified from suing on the

[37] Pease (supra), p. 518.

[38] Dawbarn (supra), pp. 225–259; 65 Univ. of Penn. Law Review, 525–526 (April, 1917).

theory that his injury was in fact due to the "accident" of his having been subjected to infection by that particular disease, as was successfully done before the passage of the section in the case of anthrax and some other diseases.[39]

"Arising out of and in the course of the employment" has also been given a very liberal construction by the British courts. As has been pointed out by a keen observer, the first half of the phrase expresses the only essential element. A just conception of the underlying principles of workmen's compensation requires that the employer be held liable only for the results of accidents arising "out of" the employment; but there is no reason why compensation should be restricted to cases of injury sustained strictly "in the course of" the same.[40] As a result, this part of the phrase has been practically nullified by the broad construction put upon it by the English courts. Thus, the "course of the employment" has been construed to include riding to and from work in the master's conveyance,[41] or in a public conveyance by understanding with him,[42]

[39] Higgins v. Campbell & Harrison (1904), 1 K. B. 328.

[40] 30 Quarterly Journal of Economics, p. 30.

[41] Mole v. Wadsworth, 6 Butterworth's Workmen's Compensation Cases 129.

[42] Holmes v. Great Northern By. Co., 2 Workmen's Compensation Cases 19.

waiting at the station for a train,[43] eating noon luncheon on the employer's premises,[44] going for pay even outside of regular working hours,[45] even going for a Sunday visit to one's wife,[46] and in one remarkable case going to a public-house for a glass of beer.[47] In short, a man has been held to be in the course of his employment "not only while he is actually at work, but while he is at any place where he was required to be by the terms of his employment, before or after his actual working time and during cessation of work for a necessary purpose, or even in legitimate intervals of leisure." [48] And he may still be acting "in the course of" his employment if, in an emergency, he goes outside his proper work, and to protect his master's interest does something wholly without the scope of that employment.

Whether an accident arises "out of" the employment, however, may be a perplexing and is always an important question. The essence of the restriction is that the accident must have some relation to the employment. But its application is at-

[43] Cremins v. Guest, 1 B. W. C. C. 160, 1 K. B. 469.
[44] Blovelt v. Sawyer, 6 W. C. C. 16.
[45] Lowry v. Sheffield Coal Co., 1 B. W. C. C. I.
[46] Richardson v. Morris, 7 B. W. C. C. 130.
[47] Martin v. Lovibond & Sons, 7 B. W. C. C. 243.
[48] Pease (supra), p. 519.

tended with considerable difficulty. Where the accident is caused directly by what the workman is employed to do, by the condition of the machinery or premises, the situation is clear enough; but where some outside agency, such as an assault, sunstroke, lightning, the negligence of a party not connected with the employment, brings about the injury, the courts are often much puzzled. "The proper test to apply in these cases," says Mr. J. G. Pease in a recent article, "is whether the nature of the employment or the place where it is carried on involves more than ordinary risk of accidents of this kind." [49]

Accordingly, it was held that where a cashier was murdered by robbers, his death was due to a risk arising out of the employment, since the generally known fact that he carried large sums about him involved him in more than ordinary risk of attack.[50] So, where a workman stationed on a high scaffolding was struck by lightning, a recovery was permitted on the ground that the nature of his employment exposed him to more than ordinary danger from the elements.[51] And a foreman of a furni-

[49] Ibid., p. 520.

[50] Nisbet v. Rayne & Burn (1910), 2 K. B. 689.

[51] Andrew v. Falesworth Industrial Society, Ltd. (1904), 2 K. B. 32.

ture-moving concern who was assaulted by a man who wished to hire a van and was told they were all out, was held to have suffered an injury "arising out of and in the course of" his employment.[52]

But where an engine-driver left his engine and crossed a siding for his own purposes, and on the return was killed by a wagon being shunted, the accident did not arise "out of and in the course of" his employment, according to an interesting case.[53] Again, a mine-collier left his special stall to ascertain the time, and was killed by a fall of the roof on his way back; the court found here that he had not gone to see the time in the interests of his employers, and so the injury did not arise "out of" the employment.[54] Nor can an assault by fellow-workmen induced by mere personal animosity be said to arise out of the employment, and it was so held.[55]

The extremely liberal construction of the courts has, as we have seen, made possible a recovery of compensation by the injured employee in a large proportion of cases. But the Act has left to the master the defense that the accident resulted from

[52] Weekes v. Stead & Co. (1914), 7 B. W. C. C. 398.

[53] Reed v. Gt. Western Ry., Stone's Insurance Cases, no. 2058, (1909) A. C. 31.

[54] Warren v. Headley's Colliery Co., Stone's Insurance Cases, no. 2065.

[55] Fitzgerald v. Clarke & Son (1908), 2 K. B. 32.

the "serious and willful misconduct" of the workman.[56] Unnecessary and deliberate disobedience of orders is usually held to be within this provision,[57] the judicial interpretation of which has been exceedingly fair and reasonable. Such an act as that of a boy in running in front of an express train out of pure bravado,[57a] or of a miner in deliberately walking along a main haulage road on which a train of coal trams was in motion, instead of taking refuge in a manhole,[58] will defeat recovery under the Act; but mere disobedience of a trifling regulation is not "unnecessary and deliberate" so as to constitute serious and willful misconduct.[59]

Possible complications arising out of the practice of sub-contracting are provided against by Section IV of the Act. A workman is entitled always to be compensated by his own master; but in cases where a third party as principal has contracted with that master to have the latter perform the whole or part of work undertaken by the principal, and injuries to the workman occur during the prosecution of such work in the course of and for the purpose of the

[56] Section I, paragraph 2.
[57] Dawbarn (supra), p. 142.
[57a] Ibid.
[58] John v. Albion Coal Co., 18 T. L. R. 27 (1901).
[59] Johnson v. Marshall, (1906) A. C. 409; M'William v. Ry. Co., 7 B. W. C. C. 875.

principal's trade or business, happening on or in or about the premises where he had undertaken to execute the work, or which were otherwise under his control or management—in these cases, the workman is entitled to recover against the principal. A man is not liable when in his private life, or for anything apart from his trade or business, he contracts with another to have work done for himself; his responsibility is limited to the instances enumerated. It is, of course, in cases where his immediate employer, the sub-contractor, is financially weak, that the workman will most often elect to claim compensation from the principal.[60]

A final point to be noted in connection with the Act of 1906 is the choice of remedies which a workman under some circumstances has. The Employers' Liability Act of 1880 was not repealed by either of the subsequent more radical measures; so if a factory laborer to-day is injured by reason of a defect in the condition of the plant or machinery due to the personal negligence of the employer, he may (1) bring an action at common-law; (2) sue under the Employers' Liability Act; or (3) apply for compensation under the Workmen's Compensation Act. By taking the last course, he avoids the dan-

[60] Dawbarn (supra), pp. 174–185.

ger of being met by common-law defenses; but as the Act limits the compensation according to arbitrary schedules, he may recover less than might be awarded by a jury, which can take personal suffering, medical expenses, etc., into consideration. On the other hand, if the workman is permanently incapacitated, the weekly stipend he could claim under the Act might be more desirable than the lump sum a jury would award. There can be no double recovery, of both damages and compensation.

Though in the National Insurance Act of 1911, which contains provisions for Health Insurance, Unemployed Insurance, and general outdoor relief,[61] England has adopted some of the features of the comprehensive German scheme, she stands committed, so far, to the more familiar form of Workmen's Compensation as the answer to the problem of industrial accidents. This is natural in a country of conservative traditions; the abandonment of the common-law criteria of negligence was a great concession, and it was not to be expected that the British mind would regard with favor what has frequently been characterized as a leap into the dark. What workingmen's insurance there is in

[61] Boyd, Workmen's Compensation, p. 1172.

England—and it is by no means inconsiderable—is carried on by private companies and mutual "friendly societies" which are very jealous of governmental interference.[62]

As the English and German acts are typical of the two most prevalent legislative methods of coping with the problem of injuries to workmen, and as they are the prototypes, in whole or in part, of most of the workmen's compensation laws of this country, we will dispose of the systems of other European nations rather summarily. In Austria, the German plan of compulsory insurance has been taken over almost bodily.[63] In France, a compromise measure[64] was enacted in 1898, which makes the employer absolutely liable, as in England, but provides for a system of voluntary insurance. Norway has a compulsory accident insurance law dating from 1894;[65] Sweden and Denmark, workmen's

[62] Frankel & Dawson, Workingmen's Insurance in Europe, p. 44; also Willoughby, Workingmen's Insurance, p. 233. The first employers' liability insurance company was founded in 1881 in England, in response to a demand for protection against the heavy liabilities imposed by the act of 1880. Economic World, vol. 99, p. 310 (March 3, 1917).

[63] Frankel & Dawson (supra), p. 115 et seq.; Willoughby (supra), p. 88.

[64] Frankel & Dawson (supra), p. 64 et seq.

[65] Bulletin No. 126, U. S. Bureau of Labor Statistics, pp. 132, 135, 163; Frankel & Dawson (supra), p. 48.

compensation acts of the English type.[66] Belgium holds employers liable for accidental injuries to employees, unless the former insure in companies approved by the state.[67] Holland has gone the whole way in compelling employers to insure, though not necessarily in the state fund provided.[68] In Italy, a compulsory insurance law was adopted in 1898; but, like the Dutch act, it allows employers considerable latitude with respect to the sort of insurance carried.[69] The compensation principle has also been adopted in some form in Finland (1895), Spain (1900), Greece (1901), Luxembourg (1902), Russia (1903), Hungary (1907), Bulgaria (1908), Liechtenstein (1910), Serbia (1910), Montenegro (1911), Switzerland (1912), Portugal (1913), and some other European states.[70]

Outside of Europe, workmen's compensation has taken a decided hold on the scattered members of the British empire. In New Zealand, the Transvaal, Cape of Good Hope, at least four of the Aus-

[66] Frankel & Dawson (supra), pp. 51, 54–57; Bulletin No. 126 (supra), p. 163.

[67] Frankel & Dawson (supra), pp. 61–62.

[68] Ibid., p. 58.

[69] Ibid., pp. 81–89.

[70] Bulletin No. 90, U. S. Bureau of Labor (September, 1910), pp. 723–748; Prof. Wambaugh's article in 25 Harvard Law Review 129 (December, 1911), refers to the above, at p. 132, note 3; see also Frankel & Dawson, Workingmen's Insurance in Europe, p. 19.

tralian provinces, and in Newfoundland, British Columbia, Manitoba, Nova Scotia, Alberta, Quebec and Ontario, acts chiefly patterned on the English law are in force; while Japan, Peru, Mexico and Venezuela have instituted the system.[71] Yet so slow were the American states in accepting the theory that, after the passage of the Quebec act of 1909, a Canadian writer found it necessary to go back to first principles in explaining it to the readers of an American law review.[72]

Yet dissatisfaction with the workings of the common-law of negligence in the United States has long been widespread. More than sixty years ago, the Georgia legislature passed an act modifying the fellow-servant rule in its application to railways;[73] and similar statutes, in one case taking the extreme form of abolition of the rule,[74] have been adopted in other states. The Federal government, which had long denied its injured employees any redress save what could be procured through the uncertain medium of the Court of Claims and special bills, made provision for compensation in the case of injury or

[71] Bulletin No. 126 (supra), p. 132; Frankel & Dawson (supra), p. 3; Bulletin No. 90 (supra); see also 5 American Economic Review 177.

[72] 11 Columbia Law Review 36.

[73] Georgia Acts of 1855–1856, p. 155.

[74] Colorado Session Laws 1901, chapter 67.

death of certain persons in the Life-Saving Service in 1882; and after 1900 various branches of the mail service and some navy employees were included in this beneficent scheme.[75]

But even after the opening of the twentieth century, progress toward the solution of the problem of compensation for industrial accidents was slow. Every one perceived the evils of the existing situation and admitted that the success of workmen's compensation in Europe warranted its adoption here; but there was no agreement as to which European model to follow.[76] In 1902 a very limited provision was made by a Maryland statute for compulsory coöperative insurance in a few employments; but this was declared unconstitutional because of its improper delegation of judicial functions.[77] In 1903–4 a Massachusetts committee on relations between employer and employee submitted to the legislature a compensation bill adapted from the English act of 1897; but no action was taken in the matter.[78] Similar committees in Illinois and other states in the next two or three

[75] Journal of Political Economy, vol. XXIII, pp. 807–808.

[76] See article by Willard C. Fisher in American Economic Review, vol. 5, at p. 223.

[77] Prof. Wambaugh's article (see footnote 70), at p. 132, note 4.

[78] Fisher (see footnote 76), p. 223, note.

years studied the subject, reported, and vanished from the pages of history without having achieved any substantial results.

The Federal Employers' Liability Act of 1906 need only be mentioned here. Its purpose was the regulation of the redress of injuries to railroad employees; but it was a true employers' liability law, and in no sense a workmen's compensation statute. It was declared unconstitutional as embracing intrastate matters, with which Congress had no power to deal;[79] and a new act, framed with a view to avoiding the constitutional defects of the original statute, was passed in 1908. This latter law "establishes the liability of interstate railway employers for their negligence resulting in injury to their employees, abolishing the defense of fellow-service, and modifying the defenses of contributory negligence and assumption of risks, and stands as the sum of present achievement in its territory."[80] The act was amended in 1910. It is, as we have seen, an employers' liability rather than a work-

[79] Howard v. Ill. Cent. R. Co. (First Employers' Liability Cases), 207 U. S. 463.

[80] Journal of Political Economy, vol. XXIII, p. 815. See article on The Federal Employers' Liability Act by William W. Thornton, in Case and Comment, vol. 22, pp. 323-329, for an excellent outline of the Act by an expert. Mr. Thornton's book—Federal Employers' Liability and Safety Appliance Acts—is the standard work on the subject.

men's compensation act; so we shall not need to scrutinize it further.

In 1908 the United States also passed what has been termed a workmen's compensation act,[81] though the fact that it applied only to employees of the enacting power and excluded injuries due to the negligence or misconduct of the workman has been said to deprive it of that character.[82] The purpose of the Act was to afford protection to "government employees engaged in hazardous occupations." It provided for the payment of full wages during disability, a feature which has been criticized as tending to encourage malingering;[83] and had other serious defects. Nevertheless, it marked a distinct advance, from the point of view of economic theory, over any previous American statute. It has now been superseded by the new Federal Workmen's Compensation Act of September, 1916, wherein the amount of compensation payable during disability is reduced to two-thirds of monthly pay, and there is added the salutary provision that a partially disabled employee must accept suitable employment or forfeit his claims under the Act.[84]

[81] 35 U. S. Stat. at Large, 556.

[82] Wambaugh (see footnote 70), p. 132, note 4.

[83] Journal of Political Economy, vol. XXIII, p. 811.

[84] Public, No. 267, 64th Cong. (H. R. 15316). Approved September 7, 1916.

In 1909, the agitation in the states first took effective shape. That year saw the first special state commissions of inquiry, in Minnesota, Wisconsin and New York; and also the impressive Workmen's Compensation conference in Atlantic City, from the twenty-ninth to the thirty-first of July.[85] In 1909, too, Montana passed a compensation law applying to miners only,[86] which was afterwards declared unconstitutional on rather narrow grounds.[87] Another statute adopted in this year was that entitled Chapter 31 of the Consolidated Laws of New York, under the head of "Labor Law —Employers' Liability," which, as amended in 1910 and 1915, constitutes an elective compensation law which has proved almost a dead letter.[88]

In 1910 New York passed a compulsory compensation law applying to certain hazardous occupations. Its fate—it was declared unconstitutional by the Court of Appeals—has been discussed at length elsewhere.

It was in 1911 that the avalanche of workmen's compensation laws began. That year is memor-

[85] Fisher (see footnote 76), p. 223, note.

[86] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.), p. 9.

[87] Cunningham v. Northwestern Improvement Co., 44 Mont. 108, 119 Pac. 554.

[88] Bradbury (supra), p. 10.

able for two decisions against the constitutionality of such acts—those of Montana and New York —but it is even more remarkable for the adoption of the compensation principle by California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington and Wisconsin. During the following year Arizona, Maryland, Michigan and Rhode Island saw the light; and in 1913 New York passed a valid compensation act, together with Connecticut, Iowa, Minnesota, Nebraska, Oregon, Texas and West Virginia. In 1914 Kentucky and Louisiana joined the ranks; the Kentucky act, however, being later declared unconstitutional and superseded by a new one. During the year 1915, compensation laws were adopted for the first time in Alaska, Colorado, Hawaii, Indiana, Maine, Montana, Oklahoma, Pennsylvania, Porto Rico, Vermont and Wyoming. Kentucky finally passed a valid statute in 1916; and during the legislative sessions of 1917 Delaware, Idaho, New Mexico, South Dakota and Utah were added to the list of compensation states. As these pages go to press, word comes that the Virginia legislature of 1918 has seen the light, and passed a compensation act over the governor's veto. These statistics represent merely the initial passage

of such laws in the thirty-eight states and three territories in which they are now in force; in addition, there have been countless amending acts and supplementary measures.[89]

In closing this long historical chapter, the writer wishes to emphasize that workmen's compensation has come to stay. In no jurisdiction where it has been adopted has it been abandoned;[90] and if this record is maintained, we shall have good reason to hope that the goal of industrial peace will eventually cease to be a mere glittering abstraction, and become a tangible reality.

[89] See the Digests of Workmen's Compensation laws published by the Workmen's Compensation Publicity Bureau; also Bulletins No. 126 and 185 of the U. S. Bureau of Labor Statistics. For an account of the Virginia act of 1918, see The Weekly Underwriter, vol. XCVIII, p. 392 (March 23, 1918).

[90] American Economic Review, vol. 5, pp. 222–223; Bulletin No. 126, U. S. Bureau of Labor Statistics, p. 29.

CHAPTER III

QUESTIONS OF CONSTITUTIONALITY

PERHAPS the most original contribution of the United States to the science of government is the conception of our written Constitution as the supreme law of the land, to which even the national legislature, chosen by the free suffrage of the people, must bow. As a natural result of this broad proposition, the courts have assumed the power, which they have exercised without serious challenge for over a century, of declaring void legislative measures in conflict with the Constitution.[1] And this power has been exercised, not only by the Federal courts, but also by the courts of the States with reference to statutory enactments of their own legislatures, the validity of which they have ventured to test by both State and Federal Constitutions.[2]

[1] Marbury v. Madison, 1 Cranch 137, 1 Curtis 368 (1803).

[2] Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431 (1911). That it is not altogether clear whether the court in the Ives case actually passed upon the Federal question, though it assumed to test the New York statute by both Federal and State constitutions, see Political Science Quarterly, vol. XXXII, pp. 546–547 (December, 1917).

Because of this peculiarity of the American system of government, the advocates of workmen's compensation in the United States have been confronted with a special difficulty wholly unlike any with which Europeans have had to cope. They have had not only to construct legislation which the Solons at the capital would consent to pass, but they have found that they must also convince the courts that it does not infringe any of the sacred Constitutional guarantees.

This enforced testing of labor legislation by the principles of the fundamental law has not been altogether a bad thing. In the heat of party warfare, under the spell of ill-considered enthusiasms, the glittering desirability of the end to be attained by proposed legislation often blinds the majority to the incidental invasions of minority rights which the method employed entails. It is the part of prudence, perhaps, to leave to the sober afterthought of the courts the ultimate solution of the problem of constitutionality to which legislators have so often applied themselves after such imperfect deliberation.

But the complaint has been made, and with much reason, that the attitude of the courts with regard to constitutional questions arising out of workmen's

compensation has been obstructive and reactionary. One of the chief objections of the courts to the workmen's compensation principle has been that it makes the employer liable without proof of fault on his part. But liability without fault is not a new thing in our law. As has been pointed out by an eminent legal authority, trover, trespass, slander and libel, all ancient parts of our legal system, require no moral obliquity; and there are examples of civil disabilities placed on men who are wholly blameless.[3] The very law of master and servant itself furnishes an illustration in the shape of the general liability of the master for the torts of the servant, whether authorized or ratified by him or not, which are done in the course of the servant's employment and the master's business.[4] The liability in the latter case is to a third party, and the responsibility is said to arise out of the peculiar relation created by the contract of employment; but it seems no more a violation of principle to hold the employer a warrantor of the safety of the employment to the servant, than to make him generally responsible to all third parties for that servant's unauthorized wrongful acts.

[3] 25 Harvard Law Rev. 134 (Dec. 1911).

[4] Burdick, Law of Torts (3d Ed.), p. 155.

Some of our courts, however, have taken a different view. The first judicial pronouncement against the constitutionality of a state workmen's compensation act (if we except the unreported decision of a lower court of Maryland in 1902, from which no appeal was taken) [5] was that of the New York Court of Appeals in Ives v. South Buffalo Ry. Co.[6] The Ives case has had a profound effect on all subsequent legislation in the United States, and has caused the advocates of workmen's compensation in many jurisdictions to frame their acts on a very different plan.[7]

The act which was overthrown by the Ives case was chapter 674 of New York laws of 1910, which went into effect on June 25 of that year. It provided that employers, in certain occupations which were designated as especially hazardous, should be liable to pay compensation based upon wages in case persons in their service engaged in manual or mechanical labor should suffer in the course of the employment a bodily injury by an accident arising out of the employment and in whole or in part caused by a necessary risk of the occupa-

[5] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.), p. 9.

[6] 201 N. Y. 271, 94 N. E. 431 (1911).

[7] Bradbury (supra), p. 10.

tion or by negligence of the employer or of any of his employees; an exception being made in cases of injuries caused in whole or in part by the serious or willful misconduct of the injured workman.[8] A provision of the Act which can hardly be commended, in view of the radical change about to be effected in the preëxisting law, was that it should take effect in less than ten weeks; this is in strong contrast to the policy of foreign workmen's compensation laws, many of which allowed a year or more for the necessary re-adjustment of men's ideas.[9]

The New York statute was declared by the court in the Ives case to be in conflict with both the Federal and state constitutions. The Fourteenth Amendment of the former, and Article I, section 6 of the latter, forbidding the taking of private property without due process of law, were violated, the judges said, by an act imposing upon an employer who had not been guilty of any fault, the obligation to pay compensation for injuries

[8] 25 Harvard Law Rev. 135—here there is an excellent summary of the Act. See also article on The Constitutionality of Workmen's Compensation and Compulsory Insurance Laws, in Case and Comment (Sept. 1915), pp. 275–280; and a discussion of The Workmen's Compensation Cases in Political Science Quarterly, vol. XXXII, pp. 542–569 (December, 1917).

[9] 25 Harvard Law Review 136.

occurring by reason of a danger which was inherent in and inseparable from a particular employment.[9a]

It would be difficult to exaggerate the sensation caused by this decision. Labor rose as a body in protest, and sober citizens who had been regarded as pillars of the existing order railed against our "reactionary" courts. Recall of judicial decisions, till then a distrusted political nostrum, became a party issue. Socialists and financiers, laymen and sober legal reasoners,[10] joined in denunciation of the New York Court of Appeals.

One of the worst features of the situation, from the point of view of the courts' defenders, was the radical divergence of views which soon appeared among the different state tribunals. Only a few months after the decision in the Ives case, the Supreme Court of the state of Washington upheld a workmen's compensation act essentially similar to the discarded New York statute, in the oft-quoted case of State ex rel. Davis-Smith Co. v. Clausen.[11]

[9a] But see footnote 2.

[10] Such as Prof. Wambaugh. See his article in 25 Harvard Law Rev. 129–139, to which reference has already been made. See also note on Ives case in 11 Columbia Law Rev. 475–476.

[11] 117 Pac. 1101 (Sept. 1911).

In the opinion, much stress was laid on the police power, which was held to justify such legislation, the court quoting [12] from Noble State Bank v. Haskell [13] as follows: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." In referring to the Ives case, the Washington court said: [14] "The principle embodied in the statutes is, however, the same, and it must be conceded that the case is direct authority against the position we have here taken. We shall offer no criticism of the opinion. We will only say that notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken."

The New York act had been compulsory, while the Massachusetts compensation law of 1911 was not; so the decision of the Supreme Judicial Court of the latter state in The Opinion of the Justices, 209 Mass. 607, cannot be deemed a disaffirmance of

[12] At page 1110.
[13] 219 U. S. 104 (1910).
[14] At page 1120 of Clausen case.

the doctrine of the Ives case. In fact, the court expressly distinguished that case,[15] and rested its decision on the ground that, in view of the non-compulsory nature of the statute under consideration, there was nothing that could be construed as violating the constitutional prohibition against the taking of private property without due process of law.[16] Nevertheless, there was a not unnatural popular notion that the court was hedging as a result of the clamor caused by the Ives case; and this impression was strengthened by the fact that the Act upheld, though not nominally compulsory, was so severe on the employer in taking away his common-law defenses as to be practically so.[17]

The case of Cunningham v. Northwestern Improvement Co.,[18] in which the Montana Miners' Compensation Law was held invalid, has been adverted to in a previous chapter. The difficulty which the Montana court had with the statute was that it submitted the employer to a double liability, as it failed to protect him after payment of compensation under the Act from an action at law for the

[15] At page 610 of the opinion.

[16] At page 612 of the opinion.

[17] See article by James A. Lowell on "Assumption of Risk and the Workmen's Compensation Act" in Massachusetts Law Quarterly, vol. 1, no. 2 (February, 1916), at p. 49.

[18] 119 Pac. 554 (1911), especially pp. 565–566.

same injury. This was felt to be a denial of equal protection of the laws. It will be seen that this decision did not squarely condemn the principle of workmen's compensation, but merely one of the details of administration; in fact, the court expressly stated that the passage of such an act was a proper exercise of the police power, was not invalid as class legislation, and did not deprive the employer of "due process of law" in spite of the fact that it substituted a special proceeding to ascertain the amount of compensation for a trial by jury. The decision was of the helpful, constructive sort, and a credit to the tribunal which rendered it. Though the case destroyed the specific act, the unprejudiced student must admit that the reasons for such action were especially strong; and the progressive views which Mr. Justice Smith advanced in his able opinion showed the legislature the way to the excellent statute which Montana now possesses.

Out of this mass of conflicting decisions one proposition came to be clearly derivable: a workmen's compensation law, if compulsory, is in danger of being declared unconstitutional by the courts; but an act which is elective in nature is not open to any of the constitutional objections yet advanced. Legislatures burning with enthusiasm for the prin-

ciple, but prudently desirous of avoiding any clash with the judiciary, began casting about for some method of dodging the issue of compulsion while yet creating a compensation system practically binding on all parties to contracts of employment.

The ingenious scheme adopted in New Jersey is the first to merit attention. By Section II of an act passed in 1911,[19] a system of workmen's compensation patterned on the English statute was introduced; but Section I contains an alternative modification of the common-law, abolishing the fellow-servant rule, assumption of risks, etc., but retaining the privilege of suit for injuries. The "alternative," however, is scarcely more than a nominal one; for every contract of hiring is presumed to be made with reference to the provisions of Section II "unless there be as part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of Section II of this act are not intended to apply."

It will be seen that, owing to this tricky presumption, the elective feature of the Act is greatly weakened. For not only are many employments en-

[19] N. J. Laws 1911, c. 95.

tered into so informally that the "express statement in writing" would never be thought of, but it is safe to say that any employer who requested prospective employees to sign such a statement would arouse so much hostility and suspicion that he would soon be glad enough to abandon the practice.

Yet the New Jersey statute was held, and I think rightly, to be constitutional.[20] There was "no coercion," said the court; and, short of coercion, no form of inducement to parties to accept a compensation act seems to be invalid. In over twenty states, varieties of "elective compensation," following more or less closely the New Jersey plan of "presumptive acceptance," have been adopted.[21]

Whether attributable to the caution with which the state legislatures proceeded, or to a change of heart on the part of the courts, the fact remains that for three years after the Ives and Cunningham cases no judicial decrees of invalidity were pronounced against workmen's compensation acts.

[20] Sexton v. Newark District Telegraph Co., 86 Atl. (N. J.) 451, especially page 455, where it is said: "No coercion was exercised by the legislature upon either party to the contract of hiring. It is left entirely optional with them whether they will stand upon the 1st or 2d sections of the act."

[21] See Digests published by the Workmen's Compensation Publicity Bureau; also texts of the acts.

The Illinois Supreme Court broke this record in Courter v. Simpson Construction Co.,[22] decided in October, 1914. In that case, however, the constitutionality of the whole act was not attacked, but merely that of paragraph (f) of section 19, which provided for a review of the decisions of the industrial board by the Supreme Court of the state. The justices found that this was in conflict with section 2 of Article 6 of the state Constitution, which gives the Supreme Court original jurisdiction only "in cases relating to the revenue, in *mandamus,* and *habeas corpus";* and as the effect of the objectionable provision in the statute was to give the court original jurisdiction on *certiorari,* that portion was declared unconstitutional without affecting any of the other sections. The decision will therefore be seen to be on a very narrow ground; and as it did not seriously affect the workings of the Act, but merely threw upon the Circuit Courts the duty of reviewing the findings of the industrial board which the legislature had sought to thrust on the higher tribunal, the result reached by the Illinois judges is not likely to arouse severe criticism.

Kentucky has now a valid compensation law in

[22] 264 Ill. 488, especially pp. 493–494.

Laws 1916, c. 33, whose constitutionality was upheld in Greene v. Caldwell; [23] but thorny roads had to be traversed before this desirable goal was attained. In Kentucky State Journal Co. v. Workmen's Compensation Board,[24] decided late in 1914, the Court of Appeals of the Blue Grass State had found Laws 1914, c. 73, in conflict with section 54 of the state constitution, prohibiting the legislature from limiting the amount to be recovered for injuries resulting in death, or for injuries to persons. A petition for re-hearing was denied.[25] Subsequent to this Kentucky decision, the courts of that state were at pains to re-affirm all the old common-law doctrines applicable to industrial accidents.[26]

In justice to the court, however, it must be admitted that the arbitrary nature of the fundamental law of Kentucky left a conscientious tribunal practically no option. As Judge Dorsey said: [27] "Whether the constitutional restrictions herein above discussed are wise or unwise, this court is bound to obey them." The real fault was in the

[23] 186 S. W. (Ky.) 648 (1916).

[24] 170 S. W. (Ky.) 1166.

[25] 172 S. W. (Ky.) 674.

[26] 180 S. W. (Ky.) 79 (fellow-servant); 180 S. W. (Ky.) 86 (assumption of risks); 180 S. W. (Ky.) 55 (duty of master to furnish safe appliances).

[27] At page 1171 of the case (170 S. W. 1166).

legislature, which should have made the Act optional, thus avoiding constitutional objections, as was finally done in the statute of 1916; or, if it were insistent on the more radical measure, should have delayed its passage until an amendment to permit of compulsory workmen's compensation laws could have been adopted by the people; a course which has been successfully pursued in California (1911), Ohio (1912), New York (1913), and Pennsylvania (1915).[28]

The Texas Workmen's Compensation Law was for some time in a state of suspended animation, two intermediate appellate tribunals having given conflicting decisions on the question of its validity. In the first of these cases, Memphis Cotton Oil Co. v. Tolbert,[29] the Court of Civil Appeals of Amarillo County held the act not violative of equal protection of the laws or due process under the Fourteenth Amendment of the Federal Constitution, and also expressly declared the statute to be within the police power and not contrary to public policy. It was suggested, but not decided, that the sections authorizing the creation and regulation of the Texas Employers' Liability Association might violate the pro-

[28] See Digests of Workmen's Compensation Aid Bureau.
[29] 171 S. W. (Tex.) 309 (December, 1914).

vision of the State Constitution relating to private corporations; but the court intimated that in such a case the objectionable sections might be eliminated without affecting the rest of the Act.

In absolute contradiction to the Tolbert case was Middleton v. Texas Power and Light Co.,[30] decided about a month later by the Austin County Court of Civil Appeals. The court said:[31] "We have reached the conclusion that so much of the statute here involved as undertakes to deprive an employee of what otherwise would be his cause of action against his employer is unconstitutional and void. . . . Our reason for holding that the provision of the statute referred to is unconstitutional is based upon the fact that it leaves it optional as to the employer, and makes it compulsory as to the employee, when the employer has elected to avail himself of the benefits of the statute." Due process of law and equal protection of the laws were both denied, the court found; and it pointed out that "it is beyond the domain of legislative power to confer upon any person authority to say what particular law, or which of two particular laws, shall govern his rights and the rights of his employee as between them."[32]

[30] 178 S. W. (Tex.) 956 (January, 1915).
[31] At page 957 of the opinion.
[32] At page 959 of the case.

This decision presented a new and interesting phase of the constitutional question. The court did not object to the statute because it was compulsory —in fact, the decision in State ex rel. Davis-Smith Co. v. Clausen [33] was expressly distinguished on the ground that the act upheld in that case was compulsory as to both employers and employees.[34] It was because the law was binding on one class—the employees—and voluntary as to the other—the employers—that it was overthrown. By one section, certain common-law defenses of the employer are abolished in personal injury suits; by another, employees of those employers who subscribe to the Act lose any right of action arising out of injury received in the course of the employment, and they are forced to look solely to specified insurance associations or companies for compensation. In other words, the employer can elect whether he shall come under the Act and pay premiums to the Insurance fund, or stay outside and be deprived of certain common-law defenses; but the employee has no election and is bound by the decision of his master in the matter.

Whether the distinction really constitutes a serious defect may well be doubted. The employee in

[33] 117 Pac. (Wash.) 1101. [34] At page 960 of the case.

either case is given a claim to compensation considerably more substantial than that which he possessed at common-law. The mere fact that the employer is left to decide whether he shall submit to being sued for injuries to his workmen without setting up his special defenses, or agree to insure in accordance with the provisions of the Act, does not impress any great hardship on the employee. The latter is not deprived of his remedy, though the nature of it is altered. The one-sidedness of the arrangement is more apparent than real. It is a mere technical defect, which the court, in the light of the powerful presumption in favor of the validity of acts of the legislature, might well have overlooked. To this view the highest court of Texas finally came in reversing the Middleton case on appeal;[35] though the particular line of argument adopted, with its resort to the fiction of an implied waiver, may be open to criticism. The court said:

"The effect of the Act upon the rights of employees cannot be properly weighed or determined without a due consideration of its aim and policy in their interest. Its theory, as it concerns them, is that the plan of compensation it provides for their injuries suffered in the course of their employment

[35] 185 S. W. (Tex.) 556.

is more advantageous than a suit for damages. In the latter, the employee is compelled to assume the burden of establishing that his injury was caused by the employer's negligence or the negligence of a servant for which the employer is responsible. His suit fails if it is subject to any of the common law defenses, that is, if his own negligence was the proximate cause of the injury, or if the injury was due to a risk he assumed, or the negligence of a fellow-servant. By the Act a fixed compensation is payable to him upon the mere happening of any injury in the course of the employment, or to his beneficiaries in the event of his death from the injury, without reference to any negligence on the part of the employer or his servants, and without regard to defenses available to the employer at common law.

"With this as the evident spirit and design of the Act in the employee's interest, his entering the service of an employer who in his business pursuit is governed by the Act, or his remaining, after notice duly given, in the service of an employer who has adopted its plan of compensation and become subject to it, is made to operate as a waiver of any cause of action against the employer on account of any injury suffered in the course of the employment, ex-

cept for exemplary damages in behalf of a surviving husband, wife, or heirs, as already noted.

"Does this deprive the employee of any vested right or property right? It is clear that it takes from him no property right. . . . That which is withdrawn from the employee is merely his right of action against the employer, as determined by the rules of the common law, in the event of his future injury. . . . There cannot be a vested right, or a property right, in a mere rule of law."

Though often discussed, the right of the legislature to abridge or abolish the master's special defenses to an action by the servant for injuries received in the course of his employment, has been denied in none of the cases involving the constitutionality of workmen's compensation acts. Probably this is because the United States Supreme Court expressly sanctioned such an alteration of the common law in the Second Employers' Liability Cases,[36] in which the constitutionality of the Federal Employers' Liability Act of 1908 was upheld. In the course of the opinion, Mr. Justice Van Devanter refuted the opponents of the Act in these memorable words:

"Of the objection to these changes, it is enough

[36] 223 U. S. 1, 50.

to observe: First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' Munn v. Illinois, 94 U. S. 113, 134; (citing also other cases). Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts or omissions which are made the basis of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making these changes Congress acted within the limits of the discretion confided to it by the Constitution."

But the act passed on in the case just quoted was only an employers' liability statute; and authoritative utterances of our highest tribunal with respect

to the constitutionality of workmen's compensation laws were long delayed. In Jeffrey Manufacturing Company v. Blagg,[37] in 1914, the Supreme Court held an Ohio compensation law valid; but that act was elective, and the case really only decided that the limitation of employers who would lose the defense of contributory negligence if they did not come under the act to those with five or more employees, was not an arbitrary and unreasonable classification. It was said in the opinion:[38] "This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers having five or more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which *voluntarily take advantage of the law.* Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it were seen fit to do so." So it will be seen that the Blagg case goes little further than the Second Employers' Liability

[37] 235 U. S. 571 (1914). [38] At page 578 of the case.

Cases; in addition to upholding the abolition of common-law defenses, it merely declares that a purely elective compensation act is not in violation of the fundamental law.

In January, 1916, however, in the case of Northern Pacific Railway Co. v. Meese,[39] a compulsory compensation law finally received the sanction of the United States Supreme Court. The Washington act, in making compensation the exclusive remedy for injuries sustained at a certain plant, was held not to violate the equal protection clause of the Fourteenth Amendment.

In closing this review of the important cases dealing with the constitutionality of workmen's compensation laws, it is fitting that the decisions in which the principle was finally vindicated in New York State, the scene of its early vicissitudes, should be referred to. The opinion of Mr. Justice Miller, of the New York Court of Appeals, in Jensen v. Southern Pacific Company,[40] which upheld the validity of the present New York act, is so illuminating, and so thoroughly in accord with the

[39] 239 U. S. 614 (January, 1916).

[40] 215 N. Y. 514, 528 (July, 1915); reversed 244 U. S. 205, but not on broad constitutional grounds, only the attempted extension of the act to admiralty matters within the federal jurisdiction being condemned.

spirit of modern labor legislation, that I have ventured to quote from it at sufficient length to illustrate the line of reasoning adopted:

"This subject should be viewed in the light of modern conditions, not those under which the common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both. Surely it is competent for the state in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may in exceptional cases work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it. Fortunately the courts have not attempted to define the limits of the police power. Its elasticity makes progress possible under a written constitution guaranteeing individual rights. The question is often one of degree. The

act now before us seems to be fundamentally fair to both employer and employee. Of course, I do not speak of details, which may or may not be open to criticism, but which, granting the validity of the underlying principle, are plainly within the province of the legislature. It is not open to the objections found to be fatal to the act considered in the Ives case. It is plainly justified by the amendment to our own State constitution and the decisions of the United States Supreme Court, notably in the Noble State Bank case, make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States."

The confidence of Mr. Justice Miller that the highest tribunal in the land would find the New York act, in its main outlines, not violative of the fundamental Constitutional guarantees was justified by the decision in New York Central R. R. Co. v. White.[41] The Jensen case itself, however, was reversed by the Supreme Court, on the ground that the extension of the provisions of the compensation act of New York to foreign vessels entering her ports, interfered with the powers of Congress over interstate and maritime affairs. The general valid-

[41] 243 U. S. 188, affirming 216 N. Y. 653. See the Consitutional Review, vol. II, p. 27 (January, 1918).

ity of the act, however, as settled by the White case, was conceded.[42]

There may well be doubt as to whether the decisions upholding the constitutionality of the present New York statute are reconcilable with the Ives case. As a recent writer has pointed out, the difference between the acts construed only accounts in part for the difference in the result; the difficulty as to the Fourteenth Amendment of the Federal Constitution is equally present in both cases.[43] But whether the Court of Appeals has receded from its original position or not, the fact remains that New York now has a valid compensation law, and one which, with its insurance provisions and more equal distribution of burdens, is better than its predecessor.[44]

On the same day that the New York statute was upheld in the White case (March 6, 1917) the Su-

[42] Southern Pacific Company v. Jensen, 244 U. S. 205. To overcome the effect of the decision so far as the admiralty feature is concerned, an act of Congress has been passed saving to claimants their rights under state compensation laws in admiralty cases. Pub., No. 82, 65th Congress.

[43] Bench and Bar, vol. 10, p. 397 (January, 1916). Prof. Powell, in an interesting article, has intimated that the Jensen case more properly turned on the application of the Federal, and the Ives case on the State constitution. Journal of Political Economy, vol. XXXII, pp. 549–550 (December, 1917).

[44] See article by Miles M. Dawson in Case and Comment, vol. 22, pp. 275–280 (September, 1915); also address by John Mitchell before

preme Court of the United States handed down opinions sustaining the acts of Iowa and Washington. The Iowa decision [45] does not consider major issues; [46] but the result reached in Mountain Timber Co. v. Washington,[47] a five to four pronouncement in favor of the compensation law of the latter state, is of the deepest interest.

The industries of the state of Washington are divided, by its compensation act, into classes, on the basis of their hazardous character; and each employer in each class is subjected to compulsory assessments for a state fund, out of which is paid compensation for all injuries occurring to employees in that class of establishments. The rates of assessment vary with the degrees of hazard in the different groups of industries; and reclassifying and readjustment of rates are provided for.

The chief difficulty which the court had with this statute was with regard to the reasonableness of the method adopted to impose the cost of the industrial

the American Association for Labor Legislation, reprinted in the American Labor Legislation Review, vol. 5, pp. 15–19 (March, 1915), in which Mr. Mitchell praises the success of the New York act, which he says pleases both employer and employee.

[45] Hawkins v. Bleakly, 243 U. S. 210.

[46] Political Science Quarterly, vol. XXXII, pp. 553–554 (December, 1917).

[47] 243 U. S. 219.

injuries on the employers; but Mr. Justice Pitney repelled the suggestion that the losses in any given class might be so heavy that the assessments required from employers in that class would leave no sufficient margin for reasonable profits, by remarking that any industry in which the "human wastage" was so great might be prohibited altogether. This, as has been pointed out, is "a significant rebuke to one of the arguments by which the common law of assumption of risks used to be supported—the argument that if employers rather than employees were compelled to assume the risk, business could not be carried on." [48] The decision is the final vindication before the highest tribunal of the land of the compulsory state insurance idea as applied to the field of industrial accidents. It opens the way for the free expansion of the principle in the legislation of the United States.

Questions of constitutionality are not now of as vital interest as they were a few years ago. The

[48] Prof. Thomas Reed Powell, in Quarterly Journal of Economics, vol. XXXII, pp. 561–562 (December, 1917). The reasoning of the court in the Mountain Timber case was a little devious; thus, the act was said to be in part an "occupation tax" on certain forms of industry, in part a plan for industrial pensions, and valid as a proper exercise of the taxing power as well as a reasonable regulation of industry. The four dissenting judges did not indicate their ground of disagreement. See The Constitutional Review, vol. II, p. 28 (January, 1918).

increasing acquiescence of all classes of men in the wisdom of providing for the victims of industrial accidents by means of some form of insurance has had a profound effect on the judicial attitude towards the subject. So, whether the bill prepared by the legislature creates a state insurance fund, or merely fixes the liability of the employer, leaving the various actuarial problems to be worked out by private companies, the courts have shown an increasing readiness to accept the proposed solution of a difficult branch of the labor problem at its own valuation. And if it be true, as has been asserted, that "no state or country has ever reverted to the liability system after having made trial of the principle of compensation," [49] judicial interference, where it occurs, is likely to have no more profound effect than to put a temporary check on an enthusiasm that will not be restrained, to delay for a brief space the advance of inevitable progress.

[49] Journal of Political Economy, vol. XXIII, p. 821 (October, 1915).

CHAPTER IV

COMPENSATION LEGISLATION IN THE UNITED STATES

In an essay of this scope and character, an exhaustive review of the manifold provisions of the workmen's compensation acts now in force in thirty-eight states and three territories would be inappropriate. Concise digests, easily available to the student, are infinitely preferable for reference work; nor could we hope to present the vast mass of material in a form at all comprehensible without adopting the tabular digest method. In the present chapter, therefore, the writer has merely undertaken to compare important and typical features of laws in force in different jurisdictions, with a view to giving the reader a good general idea of the form and extent of such legislation in this country, and indicating the points of difference which have given rise to the major problems of the subject. For clearness' sake, the discussion in each of the following sections has been limited to the topic given,

though, of course, the divisions are arbitrary and the subjects inter-related.

(1) Employments Covered. The New Jersey Act automatically extends to a larger group of employments than the compensation law of any other state.[1] All private employments are covered, except casual ones; and all public employments except elective officials and those receiving a salary of more than $1,200 a year. The Act is unique in that it extends to domestic and farm labor, branches of service to which legislatures have been reluctant to apply the workmen's compensation principle. The Federal Compensation Law alone is of broader application, covering all civil employees of the United States Government.[1a]

The provisions of the various state statutes in this connection are of two general kinds. One group consists of the laws which have been framed with the old theory, the theory that lay back of the

[1] In making this statement the author has taken into consideration the semi-compulsory nature of the New Jersey act, which applies automatically to all employments covered, though the presumption of acceptance may be overcome by notice in writing to the contrary. Many states permit *all* labor contracts to be made under the provisions of the compensation law if the parties so agree in writing, though the statutes apply automatically to none or only a limited class. See, *e. g.,* Michigan Public Acts 1912 (1st Extra Session), No. 10, Pt. I, secs. 5, 7; Idaho Laws 1917, c. 81, secs. 2–3.

[1a] Blanchard, Liability and Compensation Insurance, p. 108.

original New York act, in mind—namely, that men engaged in extra-hazardous occupations are entitled to special favor, and that they should be compensated as a matter of right for injuries sustained in the course of their work, while employees subjected to no unusual hazard should be left to the ordinary legal remedies. The other group of laws discards this theory, and gives to the compensation principle a general application, though excepting certain limited classes of employments for reasons of policy or convenience.

The author has argued to no purpose if he has not already convinced the reader that the narrow view taken by the framers of the first group of statutes is an erroneous one. Mere degree of hazard in the employment should not be the criterion of whether a workman actually disabled should be relieved or not; reasons couched in social necessity and profound economic principle demand that workmen's compensation be extended to all phases of industrial life. Nevertheless, a surprising number of states cling to the old discredited theory. In New York the legislature has undertaken the tremendous task of enumerating the hazardous employments in which it feels compensation should be permitted, and has already discovered 44 distinct

groups of such occupations.[2] The Kansas lawmakers are content with a more general description of dangerous occupations, and have so denominated all employments (in which 5 or more are engaged) carried on "in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain." [3] The opposite extreme is reached in Alaska, where compensation is provided for only in employments connected with mining operations in which 5 or more are engaged.[4]

The immense possibilities of litigation under statutes like those we have just discussed will at once occur to the reader. The line of distinction between affiliated groups of industries is often ill-defined, and cases are almost certain to arise in any jurisdiction which has sought to enumerate the "extra-hazardous" industries, in which an employee in-

[2] N. Y. Laws 1913, c. 816, sec. 2, as amended by Laws 1916, c. 622, and Laws 1917, c. 705.

[3] Kan. Gen. Stat. 1915, secs. 5900–5903, as amended by Kan. Laws 1917, c. 226.

[4] Alaska Laws 1915, c. 71, secs. 1, 38–39.

jured in a similar, perhaps more dangerous, line of work, seeks to bring himself under the act. Another weakness is that any enumeration is bound to be incomplete, since new industries spring up almost overnight; and the legislatures will be kept busy revising the lists. Moreover, the very theory on which these acts are based is bound to be transgressed. For example, the Kansas act, in enumerating hazardous occupations, includes all those carried on in a "factory," whereas it is a matter of common knowledge that the factories in certain lines of business where little machinery is used, are among the least dangerous working-places in the entire industrial field.

By far the larger number of workmen's compensation states, however, have followed the more liberal policy of including all employments except those expressly excluded. The New Jersey act, as we have seen, is the most sweeping in this respect; although Massachusetts, which includes all private employments in the usual course of trade or business of the employer, except on vessels engaged in foreign or interstate commerce, and also includes public employments under the commonwealth, and elsewhere where the municipality, county, or other employer consents, runs New Jersey a close second

in liberality.[5] The compensation law of Michigan does not apply automatically, but requires an act of election on the part of the employer; otherwise this statute would have the palm for covering the widest range of employments, all public, except as officials, and all private, except casual or not in the usual course of trade, business, etc., of the employer, being included.[6]

An almost universal tendency to treat certain occupations as outside the proper scope of a workmen's compensation act is observable. Chief among these exclusions, and the cause of much wrangling, are two classes of employment commonly grouped together—farm labor and domestic service. Among others, the statutes of Idaho, Iowa, Minnesota, South Dakota, Texas and Utah refuse compensation to the farmhand and the household servant.[7] The reasons for such exclusion seem

[5] Mass. Acts 1911, c. 751, Pt. V, sec. 2, as amended by Acts 1913, c. 568, and Acts 1914, c. 708; also Acts 1913, c. 807.

[6] Mich. Pub. Acts 1912 (1st Extra Session), No. 10, Pt. I, secs. 5, 7.

[7] Idaho Laws 1917, c. 81, secs. 2–3; Iowa Code, 1913 Supplement, sec. 2477 m (a), m 16 (a) (b), as amended by Laws 1917, c. 418, 270; Minn. Gen. Stat. 1913, secs. 8202, 8230d, g, as amended by Laws 1915, c. 193, 209; So. Dak. Laws 1917, c. 376, secs. 8, 16, 55b; Tex. Laws 1913, c. 179, Pt. I, sec. 2, Pt. IV, sec. 1, as amended by Laws 1917, c. 103; Utah Laws 1917, c. 100, secs. 51–52. The exemption of agricultural and other groups of employments from the compensation acts is probably due in large measure to politics. Rhodes, Workmen's Compensation, p. 136.

to be that labor of this sort is ordinarily migratory and uncertain; that the employer is commonly a small householder or farmer with limited means and hence seldom in a position to pay out large sums in compensation; that the close personal relationship existing between such classes of servants and their masters makes it possible to apply with little difficulty the common-law tests of comparative fault—in short, reasons of convenience. In reply it may be said that the difficulty owing to the comparative poverty of the employer may be solved by making him carry insurance, the premiums of which would be small in proportion to the smallness of the risk and the brevity of the term of the employment; that there is no difference in principle between an injury received in running a threshing-machine and one sustained in operating a loom—both ought to be compensated; and that the argument rising from the personal relationship of employer and employee is inapplicable to large-scale farming, and, often, to pretentious domestic establishments.

Casual employments, or those not in the ordinary course of the trade or business of the employer, are excluded from practically all American compensation acts.[8] The writer has elsewhere stated his

[8] See *e. g.*, Del. Laws 1917, c. 233, par. 3193qq, sec. 136; N. J. Laws

reasons for maintaining that such employees are entitled to as much consideration as those whose work is of a more permanent or regular nature. The fact remains, however, that the opposite view has commended itself to nearly all American legislatures.[9]

Some states have deemed it advisable to avoid conflicts with the Federal workmen's compensation act by excluding from the operation of the local statutes employees on railroads, or vessels in interstate or foreign commerce.[10] More commonly, however, the method followed to avoid jurisdictional complications is to declare the state law inoperative in cases to which the Federal law extends.[11]

In addition to the more general classes of excluded employments which we have discussed, the idiosyncrasies of law-makers, or the peculiar condi-

1911, c. 95, par. 23; Minn. Gen. Stat. 1913, sec. 8202, as amended by Laws 1915, c. 193; Utah Laws 1917, c. 100, sec. 51 (2).

[9] Nevada seems to be an exception. Nev. Laws 1913, c. 111, secs. 1, 43, as amended by Laws 1915, c. 190.

[10] See, *e. g.*, Mass. Acts 1911, c. 751, Pt. V, sec. 2, as amended by Acts 1913, c. 568, and Acts 1914, c. 708; Minn. Gen. Stat. 1913, sec. 8202, as amended by Laws 1915, c. 193; Tex. Laws 1913, c. 179, Pt. I, sec. 2, as amended by Laws 1917, c. 103.

[11] See, *e. g.*, Del. Laws 1917, c. 233, par. 3193ww, sec. 142; Idaho Laws 1917, c. 81, sec. 109; New Mex. Laws 1917, c. 83, sec. 11; So. Dak. Laws 1917, c. 376, sec. 17.

tions in certain states, have given rise to a number of anomalous exclusions, which have found favor only in a few jurisdictions. The Iowa law, for example, excludes employees "engaged in clerical work only," and, by an amendment of 1917, persons receiving benefits from any "firemen's pension fund" or "policemen's pension fund." [12] Workers for charitable organizations are excluded in some states,[13] outworkers [14] and members of the employer's family living in his house [15] in others. A very common provision is that employers with less than a certain number of workmen—variously fixed at three, four or five—are not bound by the compensation law, though they may elect to come under its provisions.[16] For reasons which we have already outlined, these distinctions based obviously on the employer's conjectural ability to pay seem to us unsound.

Where public employments are covered by the

[12] Iowa Code, 1913 Supplement, sec. 2477 m (a), m 16 (b), as amended by Laws 1917, c. 270, 418.

[13] See, *e. g.,* Idaho Laws 1917, c. 81, sec. 3.

[14] See, *e. g.,* Del. Laws 1917, c. 233, par. 3193qq, sec. 136; Idaho Laws 1917, c. 81, sec. 3; Conn. Laws 1913, c. 138, sec. 43, as amended by Laws 1915, c. 288.

[15] See, *e. g.,* Idaho Laws 1917, c. 81, sec. 3.

[16] See, *e. g.,* Rhode Island Laws 1912, c. 831, sec. 3; Utah Laws 1917, c. 100, sec. 51; Tex. Laws 1913, c. 179, sec. 2, as amended by Laws 1917, c. 103.

compensation acts—and this is true in most states—the policy has generally been to exclude elective officials, and very often those receiving more than a certain sum as yearly salary.[17] The writer is at a loss to determine what has actuated the first of these distinctions, unless it be a vague fear that compensation acts might become involved in politics, or some intricate theory that there is no real wage loss in such cases. The reason for the exclusion of the high-salaried man is less obscure, as such an one is deemed to be so high on the social scale, and to have had such opportunities to save and to insure himself, that there are not such strong reasons of public policy for protecting him as in the case of the indigent workman. Even conceding this, however, it is hard to see any occasion for making a distinction on such purely artificial grounds, especially as the public should be a model employer.

The writer would like to be able to say that the trend of recent legislation has been distinctly away from the narrow type of workmen's compensation act, and towards a more and more extensive application of the theory of professional risk; but such a statement would hardly be borne out by the facts. Five states adopted compensation laws for the first

[17] See, *e. g.*, N. J. Laws 1913, c. 145; Utah Laws 1917, c. 100, sec. 51.

time in 1917—Delaware, Idaho, New Mexico, South Dakota and Utah.[18] Of these, New Mexico followed the antiquated scheme of covering only enumerated extra-hazardous employments; New Mexico and Utah extended compensation provisions to private employments only when four, and Delaware when five, or more were employed; all five states excepted casual employees; while farm labor and domestic service were expressly excluded by Delaware, Idaho, New Mexico and South Dakota. Outworkers are excepted in Delaware and Idaho; and the last-named state also excludes employees of charitable organizations and members of the employer's family dwelling in his house. Delaware makes no provision for public employments; South Dakota covers them subject to substantially the same restrictions as in the case of private occupations; Idaho and Utah grant compensation to all public servants except elective officials and those whose salary exceeds $2,400 a year.

(2) Injuries covered. The phrase used in the English act—"injury by accident arising out of and in the course of the employment"—has been adopted in most of the American states. That it

[18] Del. Laws 1917, c. 233; Idaho Laws 1917, c. 81; New Mex. Laws 1917, c. 83; So. Dak. Laws 1917, c. 376; Utah Laws 1917, c. 100.

is open to serious criticism as a description of the policy of the acts, has been intimated in an earlier chapter; but "the full expression has been interpreted so generously in British and American courts that it permits awards for nearly or quite all disabilities, which can be traced to the employment of the disabled." [19] For instance, awards have been given for death by the unintended acts of another employer's servant,[20] death of an ice-driver by lightning while seeking shelter under a tree,[21] and injury due to a fellow-employee's disobedience of a foreman's orders.[22] But the general subject has been covered already in our consideration of the British Act; and it will be more useful here to discuss special features, such as the provision made by American acts in the case of injuries due to industrial disease.

So liberal has been the judicial interpretation of the terms "injury" and "personal injury," that where they are used without further qualification they will generally be construed to include both

[19] Willard C. Fisher in Quarterly Journal of Economics, vol. XXX, p. 32 (November, 1915).

[20] Bryant v. Fissel, 86 Atl. (N. J.) 458.

[21] State ex rel. People's Coal and Ice Co. v. District Court of Ramsay County, 153 N. W. 119.

[22] Scott v. Payn Bros., 89 Atl. (N. J.) 927.

disease and aggravation of existing disease.[23] But the requirement of accidental origin has limited the cases in which compensation can be recovered for disease arising out of the employment to those in which the contraction of it can be traced to a particular mishap; and there are many specific restrictions in the various statutes. Thus, in Hawaii, disease is expressly excluded unless it results from injury; and similar provisions are found in Indiana, Iowa, Delaware, Utah, South Dakota, and most of the states except those which, like Kansas, Michigan, Minnesota, Massachusetts, and New Jersey, are silent on the subject.[24] Special provisions as

[23] Fisher (see footnote 19), at pages 46–47. But a disease which is idiopathic—*i. e.,* develops gradually or at least imperceptibly and, while it may be attributable to external conditions, is also in part dependent on conditions inherent in the individual—cannot be regarded as an injury *by accident;* there is also very strong authority against compensating for purely *occupational* diseases even when the act makes no reference to a necessity of accidental origin. Kiser, Workmen's Compensation Acts, pp. 65–67.

[24] Hawaii Acts 1915, No. 221, section 60d; Indiana Laws 1915, c. 106, sec. 76d; Iowa Code, 1913 Supplement, sec. 2477-m 16 (g); Del. Laws 1917, c. 233, par. 3193ss, sec. 138 (c); Utah Laws 1917, c. 100, sec. 52 (5); So. Dak. Laws 1917, c. 376, sec. 55d. Kan. Gen. Stat. 1915, Chapter 61, Article 6, as amended by Laws 1917, c. 226; Mich. Pub. Acts 1912 (First Extra Session), No. 10, as amended by Pub. Acts 1913, Nos. 50, 79, 156, 259, and Pub. Acts 1915, Nos. 104, 153, 170, 171, and Pub. Acts 1917, Nos. 41, 206, 235, 249; Minn. Laws 1913, c. 467, as amended by Laws 1915, c. 193, 209, and Laws 1917, c. 302, 351; Mass. Acts 1911, c. 751, amended in accordance with Acts 1912,

to injury resulting in hernia are found in Idaho, New Mexico, Texas, and some other states.[25] Montana excludes disease entirely, except hernia.[26] In a few states, the policy of compensating cases of disease resulting from injury of an accidental nature has been affirmatively declared; but California alone frankly includes occupational disease.[27]

It will be seen that the legislatures have shown little eagerness to extend the compensation principle along these lines. The most liberal of the statutes (outside of that of California) are merely declaratory in this respect of the common law, which includes within the definition of "accidental injury" disease and infection naturally resulting therefrom. From the point of view of social justice this is most unfortunate. An employee in a paint factory is much more likely to

c. 172, 571, Acts 1913, c. 48, 445, 448, 568, 696, 746, Acts 1914, c. 338, 708, Acts 1915, c. 123, 275, 314, Acts 1917, c. 198, 249, 269, 297; N. J. Laws 1911, c. 95, as amended by Laws 1913, c. 174, Laws 1914, c. 244.

[25] Idaho Laws 1917, c. 81, sec. 22; New Mex. Laws 1917, c. 83, sec. 17; Tex. Laws 1913, c. 179, sec. 12b (as added by Laws 1917, c. 103); etc.

[26] Mont. Laws 1915, c. 96, secs. 6q, 16, 16j.

[27] See, *e. g.*, Tex. Laws 1913, c. 179, Pt. IV, sec. 1, as amended by Laws 1917, c. 103; N. Y. Consol. Laws, c. 67, sec. 3 (7). Cal. Laws 1917, c. 586, sec. 3 (4).

contract a case of lead poisoning than to be disabled by a fall; the disease is as serious or more so than the accident; it arises out of and in the course of his employment; it results in a loss of earning power; and yet he will receive no compensation under American laws. The danger of contracting an occupational disease is just as much a risk of the employment in which a workman is engaged, as a tangible physical injury; it is accidental in the broad sense that in most cases it cannot be foreseen; and if the theory of professional risk is sound, the industry should bear the burden of compensating the victims as well of the diseases as of the accidents for which it is responsible.

Courts and special tribunals, of a progressive cast, have in a few instances rendered decisions which may be construed as awarding compensation for occupational diseases accidentally contracted, on the theory that these really constitute accidental injuries;[28] but the weight of judicial opinion, and,

[28] See The Labor Gazette, vol. 1, p. 53 (February, 1916), commenting on a decision of the Department of Labor of this sort; also In re Doherty (1915) 222 Mass. 98, 109 N. E. 887. The eventual coverage of occupational diseases by compensation acts, "either by express legislation or by construction of the law, may be regarded as only a logical development." Rhodes, Workmen's Compensation, p. 137.

it must be admitted, of sound judicial opinion, is against thus distorting the language of the statutes.[29] If the great reform of adding occupational disease to the subjects of compensation is to be accomplished, our legislatures must follow the lead of England and other progressive nations in enacting it into law.

Though most of our states have been satisfied with the borrowed formula of "personal injuries arising out of and in the course of the employment," a few have added to or amended it in describing the class of injuries covered. Thus, in Arizona the injury must also be due to a necessary risk of the employment or to the failure of the employer or any of his employees to exercise due care or comply with any law.[30] In Colorado, the workman must have been performing service arising out of and in the course of the employment when injured to be entitled to compensation.[31] The Oregon act insists that the injury shall be by violent or external means; while in Washington only personal injuries sustained while upon the premises or at the plant

[29] Honnold, Workmen's Compensation, pp. 536–544; Kiser, Workmen's Compensation Acts, p. 69.

[30] Ariz. Rev. Stat. 1913, p. 1054, sec. 2.

[31] Colo. Laws 1915, c. 179, sec. 8.

of the employer, or in the course of the employment away from the plant, will sustain a claim.[32] In Wisconsin, compensation will be paid only to those workmen who were engaged at the time of the injury in performing service growing out of and incidental to the employment.[33] It will be seen that most of these variations on the old theme add little to it; their presence in the statutes is no doubt due to attempts on the part of inexpert draftsmen to make their meaning unmistakably clear.

(3) Forfeiture for misconduct. Under almost all of the American statutes, some sort of misconduct on the part of the injured employee will prevent him from recovering compensation. The two instances in which awards are most commonly denied are: (1) where the employee's intoxication was a proximate and efficient cause of the injury; (2) where the injury was self-inflicted. In addition, "willful misconduct," consisting in disobedience of orders, failure to use safety appliances, deliberate breach of statutory regulations, and culpable negligence, is sometimes made a cause of forfeiture.

A rather unusual form of restriction is the pro-

[32] Ore. Laws 1913, sec. 21; Remington and Ballinger's Ann. Codes and Stat. Wash., sec. 6604–5.

[33] Wis. Laws 1913, c. 599, sec. 2394–3.

vision in the Colorado statute that injuries intentionally inflicted by self or another are not subject to compensation.[34] The reason for excepting the latter class of cases from the operation of the act is by no means clear, for injuries intentionally inflicted by another often arise out of and are due to risks peculiar to an employment. For example, a "bouncer" in a café who threatens to eject an obstreperous customer, and is thereupon assaulted by the latter, sustains injuries arising out of and in the course of his employment in the fullest sense of the word. Perhaps the Colorado statute would deny such an one compensation on the ground that he has a remedy in damages against the assaulting party; but the worthlessness of this claim in the typical case is the best reason for permitting a recovery of compensation from the employer whose business is of such a character as to subject his workmen to risk of assault by irresponsible third parties.

A more reasonable provision is that of the Oklahoma statute, which denies compensation where the injury is caused by intention to injure self or another.[35] Self-inflicted injuries are clearly outside

[34] Colo. Laws 1915, c. 179, sec. 8.
[35] Okla. Laws 1915, c. 246, Art. II, sec. 1.

the scope of the workmen's compensation principle, for they are quite exceptional and in no wise results of a risk of the employment. In most cases, too, injuries to the employee caused by his intention to injure another cannot be said to arise out of the employment. There may be instances in which this is not true; but public policy would seem to forbid the award of compensation in such cases on the ground that it would amount to condoning an assault. However that may be, the provisions of the Oklahoma statute are substantially duplicated in the acts in force in Alaska, Delaware, Hawaii, Idaho, New York, Texas, and a number of other jurisdictions.[36] Statutes excluding injuries "intentionally self-inflicted," "by deliberate intention," and so forth, but making no mention of those sustained by reason of intention to injure another, have been adopted in Louisiana, Maryland, Minnesota, New Jersey, New Mexico, and other states.[37] The vague phrase "serious and willful miscon-

[36] Alaska Laws 1915, c. 71, sec. 4; Del. Laws 1917, c. 233, par. 3193jj, sec. 129; Hawaii Acts 1915, No. 221, secs. 1, 3; Idaho Laws 1917, c. 81, sec. 5; N. Y. Consol. Laws, c. 67, sec. 10; Tex. Laws 1913, c. 179, Pt. IV, sec. 7, as amended by Laws 1917, c. 103; etc.

[37] La. Sess. Acts 1914, No. 20, sec. 28, as amended by Sess. Acts 1916, No. 243; Md. Acts 1914, c. 800, sec. 46, as amended by Acts 1916, c. 597; Minn. Gen. Stat. 1913, c. 84A, sec. 8203; N. J. Laws 1911, c. 95, par. 7; New Mex. Laws 1917, c. 83, sec. 8; etc.

duct" is used in Massachusetts;[38] and "willful misconduct" elsewhere.[39] Where injuries are due to breach of statutory safety regulations, or neglect to use guards or safety devices furnished by employers, compensation is sometimes denied.[40] Delaware refuses to extend the protection of the law to cases where the accident was owing to "recklessness."[41] In California, if the employee's injury is caused by his serious and willful misconduct, the compensation otherwise recoverable by him is reduced one-half, subject to certain restrictions.[42]

The intoxicated workman has few friends, as is illustrated by provisions with regard to the forfeiture of his claims in practically all of the compensation states.[43] Some of the laws have particularized, providing that only drunkenness "while on duty" shall prevent recovery.[44] The provision in the

[38] Mass. Acts 1911, c. 751, Pt. II, sec. 2.

[39] Mich. Acts 1912 (First Extra Session), Part II, sec. 2; So. Dak. Laws 1917, c. 376, sec. 7; etc.

[40] See, *e. g.,* La. Sess. Acts 1914, No. 20, sec. 28, as amended by Sess. Acts 1916, No. 243; Okla. Laws 1915, c. 246, Art. II, sec. 1.

[41] Del. Laws 1917, c. 233, par. 3193jj, sec. 129.

[42] Cal. Laws 1917, c. 586, sec. 6 (a) (4).

[43] See, *e. g.,* Del. Laws 1917, c. 233, par. 3193jj, sec. 129; Kan. Laws 1911, c. 218, sec. 1, as amended by Laws 1917, c. 226; Minn. Gen. Stat. 1913, c. 84A, sec. 8203; New Mex. Laws 1917, c. 83, sec. 8; Tex. Laws 1913, c. 179, Pt. IV, sec. 1, as amended by Laws 1917, c. 103.

[44] See, *e. g.,* N. Y. Consol. Laws, c. 67, sec. 10; R. I. Laws 1912, c. 831, Art. II, sec. 2.

Maine statute is a curious one; it makes intoxication "without the employer's knowledge" a bar to obtaining awards under the act.[45] Why the *knowledge* of the employer should affect his liability it is difficult to understand, though his *consent* might conceivably estop him from setting up his workman's intoxication as a defense to the latter's claim.[46]

The inconsistency of American compensation laws with regard to the classes of injuries covered leaves much to be desired. But uniformity in this respect, though a "consummation devoutly to be wished," is not of the first importance. The essential thing is substantial justice to the parties concerned; and it is encouraging to note that the conditions of forfeiture, though so diverse in character, are not, on the whole, unreasonable or un-

[45] Me. Laws 1915, c. 295, sec. 8.

[46] "—if the employer knew or in the exercise of ordinary care might have known" that the employee was intoxicated or in the habit of becoming so while on duty, he cannot set up the defense of the latter's intoxication, according to the act. This sort of estoppel is a curious survival of the doctrine of negligence and comparative fault; though the employee was in the wrong, the negligence of the employer in not informing himself of his servant's dissolute habits, gives the latter an opportunity to secure his compensation nevertheless. This is out of the spirit of modern compensation legislation, and also of the provision for forfeiture on account of drunkenness, which should be absolute to be effective. Perhaps the Maine legislature is trying to discourage the employment of drinking men.

fair.[47] Furthermore, they have been very generously construed in almost all jurisdictions.[48]

(4) The Compulsory Principle. Very few of the American compensation acts are compulsory in their operation with regard to private employments. Legislators have been afraid of raising the ghost of the Ives case; in part, too, they have been guided by a not unpraiseworthy and very natural conservatism. They have felt that they were forcing an experiment upon the commonwealth, and that timid employers and skeptical employees should be permitted to withdraw and see how it worked out. Nevertheless, a conviction of the soundness of the principle seems to have taken hold on these eminent gentlemen; and they have somewhat inconsistently made it so hard for the employer if he does not accept the act that he is virtually left with no choice in the matter.

A typical statute of this nature is that in force in Massachusetts. According to Section 1 of Part I, employers who do not accept the act are deprived of the defenses of contributory negligence, negligence of a fellow-servant and assumption of risk. This

[47] See Willard C. Fisher in Quarterly Journal of Economics, vol. XXX, p. 42 (November, 1915).

[48] Ibid., p. 43.

provision was clearly intended, as one writer has quaintly said, "to force employers to take advantage of" the provisions of the act.[49] Whatever may be thought of the insertion of such a rule in "elective" statutes, its popularity as a means of gently coercing the employer is attested by its adoption in a majority of the compensation states.[50] Moreover, in New Jersey, a similar result is reached where there is no mutual assent of employer and employee to the compensation features of the act.[51]

A most effective method of foisting compensation on the parties, willynilly, without technical "compulsion," is the "presumption of acceptance." This ingenious scheme was first tried out in New Jersey, and has had many imitators. It consists in conclusively presuming that the employer or employee or both have consented to be bound by the provisions concerning compensation in the absence of written or other notice to the contrary. About half of the compensation states presume the acceptance of both employer and employee unless one or both gives notice to the opposite effect; and a considerable num-

[49] James A. Lowell in Massachusetts Law Quarterly, vol. I, p. 49 (February, 1916).

[50] See, *e. g.*, Del. Laws 1917, c. 233, pars. 3193d (sec. 97), 3193f (sec. 99); Pub. Acts Mich. 1912, No. 10, Pt. I, secs. 1, 2; etc., etc.

[51] N. J. Laws 1911, c. 95, pars. 1–3, 5, 8–9; as amended by Laws 1913, c. 174, and Laws 1914, c. 244.

ber of other jurisdictions, while requiring an affirmative act on the part of the employer to constitute an election, presume that the employee has accepted unless he files notice to the contrary.[52]

There are a few states which have tempted Providence in the shape of an indignant judiciary by passing compulsory compensation or insurance laws. Such are Maryland, Idaho, Utah, Ohio, and a few other progressive jurisdictions; the new United States compensation law is also compulsory within its field.[53] Now that the bogey of unconstitutionality is fast losing the terrors it possessed in the childhood of the compensation principle, we may look for general acceptance of compulsory statutes; and the trend of opinion seems clearly in that direction.[54]

[52] For typical statutes presuming the acceptance by the parties, see New Mex. Laws 1917, c. 83, sec. 4; Iowa Code, 1913 Supplement, sec. 2577 m (c-4), 2477 m 2; etc. For statutes presuming election by employee where employer has elected, see Cal. Laws 1917, c. 586, sec. 70 (a), (b); Tex. Laws 1913, c. 179, Pt. I, sec. 3 a (as added by Laws 1917, c. 103).

[53] Md. Laws 1914, c. 800, secs. 14–15; Idaho Laws 1917, c. 81, sec. 4; Utah Laws 1917, c. 100, sec. 52 A; Ohio Gen. Code, secs. 1465–1469; Act No. 267, 64th Cong. (approved Sept. 7, 1916), sec. 1.

[54] See Williams, Lewis C., in Case and Comment, vol. 22, p. 296 (September, 1915). The elective type still prevails, however; about two-thirds of all American compensation laws being elective. Rhodes, Workmen's Compensation, page 133. Mr. Blanchard finds elective clauses which are no more than "a trick to evade the constitutional question . . . subversive of good legislative practice" and

(5) Nature of Awards. The introduction of workmen's compensation into this country was too hasty and precipitate to permit of the immediate preparation of the necessary statistical material on which to base economically sound schedules of awards.[55] Nor was the experience of Europe of much value in this respect; for in Germany the insurance plan is backed by an absolute government, so that it cannot fairly be compared with the system which it would be possible to establish in our states; and both in Germany and other European countries widespread confusion results from the variety of methods employed in publishing and studying accident statistics.[56] The consequence has been a very great and unscientific diversity among the provisions of our state laws.

Some idea of the lack of unanimity among our states in this respect may be gathered from a perusal of the provisions of typical statutes. For total disability, for instance, Rhode Island employers must pay their injured workmen 50% of weekly wages

"an argument in favor of constitutional amendment." Blanchard, Liability and Compensation Insurance, pp. 107–108.

[55] Rubinow, I. M., in Quarterly Publications of the American Statistical Association, vol. XIV, new series No. 109, at page 358 (March, 1915).

[56] Rubinow (supra), page 361; Bradbury, Workmen's Compensation (2d ed.), pages 65–66.

for a period of 500 weeks, if the disability lasts so long; but the weekly payments are subject to a maximum of $10 and a minimum of $4.[57] Where total disability is permanent, California grants compensation at 65% of weekly earnings for 240 weeks, thereafter at 40% for life.[58] In Kansas, a workman thus incapacitated receives 60% of wages for a maximum period of 8 years, weekly payments not to exceed $15 or be less than $6.[59] Still other states set the percentages at 55%, 66⅔%, etc.; while the period during which compensation is to be paid, and the gross amounts which it must not exceed, vary within wide limits.

A particularly vicious provision is that in force in a few states, notably Kansas, New Jersey and Texas, restricting compensation in certain cases of permanent partial disability, such as loss of an arm, an eye, the hearing of both ears, etc., in accordance with a fixed schedule.[60] Thus, a New Jersey employee who loses his hand, is paid 50% of daily wages during 150 weeks; a Kansas worker who is made completely deaf, obtains 50% of aver-

[57] R. I. Laws 1912, c. 831, secs. 10–12.

[58] Cal. Laws 1917, c. 586, sec. 9.

[59] Kan. Gen. Stat. 1915, sec. 5905, as amended by Laws 1917, c. 226.

[60] Ibid.; N. J. Laws 1911, c. 95, sec. 11 (c); Tex. Laws 1913, c. 179, secs. 11, 12, as amended by Laws 1917, c. 103.

age weekly wages during 100 weeks; and so forth. The absurdity of this crude method of ascertaining and compensating wage loss causes a smile; but it really presents a serious problem. It is so easy to dodge responsibility for accurate computations by bringing all classes of toilers within a blanket provision, and the simplicity and comparative inexpensiveness in operation of such a statute makes so strong an appeal to the economical mind, that there is real danger of the plan finding favor with superficial thinkers. Reflection, however, quickly discloses its faults. A very grave injustice results, for example, when a clerk receives the same compensation for the loss of a left arm as a carpenter. The former finds his earning power only slightly impaired; the latter must abandon the trade to which he has been trained and seek an entirely new field of endeavor. Again, a musician and a stoker both become deaf due to accidental injury arising out of and in the course of the employment. One sees his entire means of livelihood swept away; the other may continue in his occupation.

Any graduated scale of awards must take into account the different degrees of injury—temporary partial disability, temporary total disability, perma-

nent partial disability, permanent total disability, and death. Where a workman is slightly incapacitated for a limited time, by an accident of his employment, enlightened public policy dictates that his wage loss should be made up to him in part, great care being exercised to avoid awards so lavish as to encourage malingering. Such cases, however, are the least pressing, and most of the compensation acts are generous enough in this regard. It is when we come to injuries which, while partial, are permanent, and total disability, either temporary or permanent, that the problems arise. Wage loss here is serious, and affects not only the workman and his family, but the whole community, which is at the same time deprived of his services and in danger of being saddled with his support.

The search for a common principle to govern these cases leads to the following conclusions: (1) In death cases the question of prime importance is the number of dependents of the deceased and the extent of their dependency. If there are no dependents, there seems no social necessity for compensation other than that needed to cover medical treatment and burial; but where the deceased was the chief or sole support of a family, it is impera-

tive both from the point of view of common humanity and that of community interest that the surviving dependents receive substantial assistance during the continuance of dependency.[60a] (2) In all cases of injury not resulting in death, awards should be so graduated as to take into consideration both loss of earning power and the number of dependents of the person thus incapacitated. Especially is this true where permanent total disability results. The failure to apply this double standard is one of the chief defects in American compensation legislation, most of our statutes confining their consideration to wage loss alone. (3) The percentage of weekly wages on which computations are based should be more elastic to accommodate itself to varying circumstances. Thus, an unmarried employee temporarily disabled might be entitled to receive only 50% of weekly wages, with a proper minimum, while his comrade with a large family should be granted 75%. Workmen's compensation is primarily a social problem, and uniformity of awards should not be adhered to blindly, when such action would result in semi-starvation in one family, and comparative superfluity in another. For the normal case, however, 66⅔% of weekly wages may be

[60a] 24 Journal of Political Economy, pp. 951–952 (December, 1916).

said to be a fair percentage; 50% is too low, and more might encourage malingering.[60b]

The principles outlined above, however, have been slow in impressing themselves on the minds of our legislators. Only a few states gauge the percentage of weekly wages payable as compensation by the number of dependents of the employee;[61] many jurisdictions have provided that in the case of death no more than a certain gross sum ($3,500 in Kansas;[62] $4,000 in Utah;[63] etc.) shall be paid to surviving relatives, instead of making awards co-extensive with the continuance of dependency; and the provisions limiting the maximum weekly amount which may be disbursed to one injured workman under the law (in some states as low as $10)[64] stand in the way of any liberal application of the compensation principle.

[60b] Blanchard, Liability and Compensation Insurance, pp. 127–128.

[61] And this only in death cases. The New York provisions are especially interesting. See N. Y. Consol. Laws, c. 67, sec. 16, as amended by Laws 1916, c. 622.

[62] Kan. Gen. Stat. 1915, sec. 5905, as amended by Laws 1917, c. 226.

[63] Utah Laws 1917, c. 100, sec. 76.

[64] *E. g.*, N. J. Laws 1911, c. 95, par. 12. Limitations of compensation payments by a maximum weekly amount are unsound in principle; and the tendency is to remove them altogether. Rhodes, Workmen's Compensation, p. 147. The practice of limiting either the aggregate amount of such payments or the number of weeks during which payment should be made, should be "condemned without reserve." Blanchard, Liability and Compensation Insurance, p. 128.

One feature common to nearly all American compensation acts is worthy of hearty commendation. This is the practice of making awards in small periodical payments instead of in a lump sum. In this the compensation system differs from, and has great practical advantages over, the common law; for the small periodical payments put less strain on the employer and his insurance carrier, are better for the workmen in that they offer less temptation to squandering and furnish a modest but sufficient subsistence over an extended period, and are to the advantage of the community in that there is less likelihood of their being diverted from their purpose of obviating the social problem of poverty, to investment and speculation. The rule is not iron-bound, however, and most states permit commutation of periodical payments to a lump sum in cases where under special circumstances this course seems advisable.[65]

(6) The Waiting Period. Most of the American compensation laws provide for an interval of time between the commencement of the disability and the beginning of payments, set variously at

[65] *E. g.*, Mass. Acts 1911, c. 751, sec. 22, as amended by Acts 1914, c. 708; Cal. Laws 1917, c. 586, sec. 28; Ohio Acts 1913, sec. 40, as amended by Acts 1917, House Bill 506.

from one to three weeks.[66] The purpose of such a provision is twofold—to relieve the administration of the act from the burden and confusion of payments for trifling injuries, and to lessen the temptation to malingering on the part of the employee. But workmen cannot see the reason for the waiting period;[67] and where a laborer is very poorly paid and living from hand to mouth, it may be a real injustice to make him wait for his compensation.

Waiting periods may be said to be of two kinds: those which merely postpone compensation, which at the expiration of the period (if the employee is still disabled) is computed from the date of injury; and those which constitute a real gap for which no compensation is recoverable. The latter type is very objectionable, to my mind; but it is easily the more common in this country, being found in the statutes of most of the compensation states.[68] The other kind of waiting period, which merely post-

[66] Tex. Laws 1913, c. 179, Pt. I, sec. 6, as amended by Laws 1917, c. 103 (one week); Cal. Laws 1917, c. 586, sec. 9 (b) (1) (ten days); Iowa Code, 1913 Supplement, sec. 2477-m 9 (g), as amended by Laws 1917, c. 270 (two weeks); New Mex. Laws 1917, c. 83, sec. 18 (three weeks).

[67] American Labor Legislation Review, vol. V, at page 76 (March, 1915).

[68] *E. g.*, Minn. Gen. Stat. 1913, sec. 8211, as amended by Laws 1915, c. 209, and Laws 1917, c. 302; New Mex. Laws 1917, c. 83, sec. 18; etc., etc.

pones awards for the probationary time until the injury is established as serious enough to merit compensation, and which may be defended as tending to simplify the administration of the acts, has been established in several states.[69] In Washington, Oregon and Porto Rico there is no waiting period.[70]

The tendency as illustrated by recent legislation seems to be towards adopting a standard waiting period of one week, rather than towards abolishing it altogether.[71] On the other hand, the New Mexico act of 1917 establishes a waiting period of three weeks—the maximum in the United States.[72] The author's feeling is that this feature of compensation legislation should be done away with en-

[69] The form which these statutes generally take is to have a waiting period for ordinary injuries, with the proviso that if the incapacity extends for more than a certain fixed period, compensation is payable from the date of injury. Some of the laws, with the periods beyond which incapacity must extend to render nugatory the waiting period, are: N. Y. Laws 1913, c. 816, sec. 12, as amended by Laws 1917, c. 705 (49 days); So. Dak. Laws 1917, c. 376, sec. 24 b (8 weeks); Mich. Pub. Acts, First Extra Session, 1912, No. 10, Pt. II, sec. 3 (8 weeks); R. I. Laws 1912, c. 831, Art. II, sec. 4, as amended by Laws 1917, c. 1534 (4 weeks).

[70] Remington and Ballinger's Ann. Codes and Stats. Wash., secs. 6604–5 d (but no compensation is payable unless loss of earning power exceeds 5%); Oregon Laws 1913, c. 112 (as amended by Laws 1915, c. 271), sec. 21 b, c, d; Porto Rico Acts 1916, No. 19.

[71] This is the conclusion reached by Dr. Rubinow in an article in 26 Journal of Pol. Economy, p. 273 (March, 1918).

[72] New Mex. Laws 1917, c. 83, sec. 18.

tirely, or, if retained, should be set at three days or some similarly low mark.[73]

(7) Medical and Surgical Aid. Compensation awards are intended to take the place in some degree of wages, and to defray the ordinary expenses of the injured workman and his family during the enforced hiatus in his productive activity. It is obvious, however, that this fails entirely to cover one class of very necessary expenditures—the medical and surgical treatment, the hospital charges, and the countless incidental calls on the purse, which the injury entails. To very poor workmen, and families living on a margin, "doctors' bills" come as a crushing blow, and the utter impossibility of paying them out of the pittance reserved for the absolute essentials of every-day life, is manifest. Especially is this true in states where "waiting periods" immediately follow the injury, and no compensation is forthcoming at the very time when the injured man most needs the costly attention and care of a physician. The neglect and consequent endangering of life and retarding of recovery which would be the inevitable outcome if no special provision were made for these cases, present a serious

[73] The waiting period under the Federal compensation law is 3 days. Act No. 267, 64th Cong. (1915–1916), sec. 2. Four days is the length advocated by a recent writer. McCanna, The New Era, p. 102.

social problem; for anything that tends to prolong the laborer's period of enforced idleness causes an additional drain on the resources of the community. To meet this condition, nearly all compensation states have made some provision for medical and surgical aid for an injured employee.[74]

In most jurisdictions, "reasonable" medical and surgical aid, including hospital treatment, the services of nurses, and such crutches, apparatus, and medical and surgical supplies as may be necessary, are required to be furnished by the employer or responsible insurance carrier. In almost all states, however, this generous scheme is subject to limitations, both as to time and amount. In Delaware only $25 may be spent for this purpose, and treatment must not extend over a period greater than two weeks.[75] New Jersey is scarcely more generous, having the same restriction as to time, and a maximum disbursement of $50.[76] South Dakota

[74] *E. g.,* Iowa Code (1913 Supplement), sec. 2477-m 9 (b), as amended by Laws 1917, c. 270; Del. Laws 1917, c. 233, sec. 101; Utah Laws 1917, c. 100, sec. 86; Kan. Gen. Stat. 1915, sec. 5905, as amended by Laws 1917, c. 226; Vt. Laws 1915, c. 164, sec. 14, as amended by Laws 1917, c. 173. There is no provision for medical or surgical aid in Arizona, Washington, or Wyoming. Blanchard, Liability and Compensation Insurance, p. 126.

[75] Del. Laws 1917, c. 233.

[76] N. J. Laws 1911, c. 95, par. 14, as amended by Laws 1913, c. 174, and Laws 1914, c. 244.

and Iowa set a maximum of four weeks and $100;[77] Kansas, 50 days and $150;[78] Utah has no time limitation and permits as much as $200 to be spent for this purpose.[79] Texas has wisely set no limit on the amount which may be expended, and while providing that in general the injured workman shall not be reimbursed for more than two weeks of treatment, allows some latitude where total disability results.[80] California and Idaho are even more liberal, and, recognizing that each case must be decided on its own merits and in the light of its peculiar circumstances, provide for such treatment as is reasonably required for a reasonable time, with no further restrictions.[81]

"One of the objects of compensation is the conservation of human resources," remarks a recent writer;[82] and if this is conceded (as it must be) adequate provision for medical and surgical aid will be seen to be a very essential part of the great social scheme of which this modern legislation is the ex-

[77] So. Dak. Laws 1917, c. 376, sec. 24 a; Iowa Code (1913 Supplement), sec. 2477-m 9 (b), as amended by Laws 1917, c. 270.

[78] Kan. Gen. Stat. 1915, sec. 5905, as amended by Laws 1917, c. 226.

[79] Utah Laws 1917, c. 100.

[80] Tex. Laws 1913, c. 179, secs. 7a, 7b, 12e, 12f, as amended by Laws 1917, c. 103.

[81] Cal. Laws 1917, c. 586, secs. 9 a, 10; Idaho Laws 1917, c. 81, secs. 16-17.

[82] Rhodes, Workmen's Compensation, page 144.

pression. It is of the first importance that every injured employee should receive immediate and efficient care; for if he does not, the community, the taxpayer, the consumer, in the end pay more, and the world is poorer by the labor which the unfortunate victim might have been enabled to resume. To the law-makers, therefore, we recommend the passage of the broadest sort of statutes, vesting authority in proper bodies to determine the reasonable expenditure necessary to bring the injured workman back to the highest possible efficiency, and to decree the payment of the same. Stingy allowances represent a penny-wise, pound-foolish policy, as indefensible on economic grounds as it is from the humanitarian standpoint.

Another question of importance in this connection is whether the selection of a physician should be left with the employer, the employee, or some other agency. A recent writer has urged with some eloquence that the employee should exercise the choice in this matter, since his confidence in his physician may be an important element in hastening his recovery; though this same author concedes that the judicial tendency, in the absence of express provision in the statutes, has been to leave with the employer the discretion in selecting the medical attendant,

subject to the limitation of reasonableness.[82a] Both plans have disadvantages. Where an impartial commission administers the statute, it would seem that that body might well be empowered to decide in this matter as in others.

(8) Methods of Administration. The difficult problem of securing a competent body to administer the compensation laws has been met by the states in various ways. In New Jersey, the local Court of Common Pleas hears and determines disputes arising under the act; from its decision there is an appeal to the state Supreme Court, but only on questions of law.[83] This system has been severely criticized, and the adaptability of the law courts to such purposes questioned. In most states, such matters as are susceptible of agreement or arbitration will be composed, if possible, in that manner; but if cooperative means fail, a hearing before the state Industrial Commission or similar body is resorted to. The right to appeal to the highest court of the state is commonly granted.

As litigation, with its inevitable delays and complications, was one of the chief and recognized defects of the common law system, one would natu-

[82a] McCanna, The New Era, pp. 86–87.

[83] N. J. Laws 1911, c. 95, pars. 18, 20, as amended by Laws 1916, c. 54.

rally expect to find legislators anxious to take compensation cases out of the courts; and the failure to do so in several states is a disappointing feature. However, as has been pointed out by a recent writer,[84] laws which leave the settlement of compensation suits to the courts generally endeavor to eliminate delay by providing that cases be decided summarily and with the least possible indulgence in legal technicalities. For example, in Minnesota disputed claims may be submitted by either party to a judge of the District Court, who hears the case and settles it in a summary manner, appeal from such judgment to the Supreme Court being permitted on questions of law only.[85] In New Jersey, if no agreement is filed within 21 days, the facts with regard to the claim are certified by the Workmen's Compensation Aid Bureau to the Judge of the Court of Common Pleas, who decides both law and facts; his decision is subject to review on questions of law by the Supreme Court.[86] New Mexico, however, utilizes the judicial machinery just as in ordinary civil cases, trial being had, on filing the claim, before the District Court, in case

[84] Rhodes, Workmen's Compensation, p. 181.

[85] Minn. Gen. Stat. 1913, secs. 8216, 8219, 8225, as amended by Laws 1915, c. 209.

[86] See footnote 83, *supra*.

of non-payment of any claim of which notice has been given to the employer, either party being entitled to demand a jury trial, and the final order being reviewable by the Supreme Court upon appeal or writ of error in the same manner as other cases.[87]

The court system of administration has one disadvantage which is fatal to its efficiency. It thrusts upon judges who are selected, and rightly selected, mainly because of their expert knowledge of the law, the practical working out of a system which involves few legal principles but requires for its proper handling a close familiarity with the industrial field and problems of labor. A magistrate who copes with the interpretation of contracts, the title to realty, the law of assault, every day, has neither time nor inclination to master the question of how far a glass-blower is disabled for profitable employment by the loss of his hearing, or what degree of dependency will justify the minimum award to dependents, especially when the compensation cases on the court docket are relatively few. An Industrial Accident Commissioner, or a special Board or other tribunal, endowed with special knowledge and devoting its entire time to compen-

[87] New Mex. Laws 1917, c. 83, secs. 13, 15, 24.

sation work, would be immeasurably more efficient. This conclusion has evidently been pretty generally attained, as most states have provided for administration by such an individual or body.[88]

Some of the typical statutory provisions may profitably be reviewed here. In Massachusetts, employer and employed may settle the claim by agreement, subject to the approval of the Industrial Accident Board; in case of dispute either party may notify the Board, which must assign the case for hearing by a member thereof; and an appeal from the Board's order or decision may be taken within ten days after notice of filing.[89] In Iowa, the Industrial Commissioner may pass on agreements; or an arbitration committee appointed by the parties and the Commissioner may decide the

[88] *E. g.,* Mass. Acts 1911, c. 751, Pt. III, as amended by Acts 1912, c. 571, Acts 1913, c. 48, 448, 746, Acts 1914, c. 708, Acts 1915, c. 132, 275, Acts 1916, c. 72, Acts 1917, c. 297 (Industrial Accident Board); Cal. Laws 1917, c. 586, sec. 3 (1), also Laws 1913, c. 176, secs. 3–11 (Industrial Accident Commission); R. I. Laws 1912, c. 831, Art. VI, sec. 6, as added by Laws 1915, c. 1268 (commissioner of industrial statistics); Kan. Gen. Stat. 1915, secs. 5933–5937 (superintendent of insurance); Porto Rico Acts 1916, No. 19, sec. 10, as amended by 1917 act approved April 12, 1917 (Workmen's Relief Commission). For arguments in favor of administration by a commission or industrial accident board, see Blanchard, Liability and Compensation Insurance, pp. 136–137; McCanna, The New Era, p. 102.

[89] See secs. 4–11 of Pt. III of Mass. act, as cited in footnote 88, *supra;* also Mass. Acts 1915, c. 132.

claim, subject to review by the Commissioner, from whose determination appeals on certain specified grounds only are allowed.[90] In Utah, the Industrial Commission has full power to hear and determine all questions pertaining to payment of compensation; if it denies a claim on a ground going to the basis of the claimant's right, appeal may be taken in 30 days to the District Court with privilege of jury trial; and a further appeal to the Supreme Court is provided for.[91] Idaho encourages settlement by agreement, subject to approval by the Industrial Accident Board; in case of dispute, either party may apply for appointment of an arbitration committee to be composed of three members representing both parties and the Board, whose decision is subject to review by the full Board upon application for such within 30 days, or in case no award is made within 30 days; and from thence appeal is to the District Court on questions of law only.[92]

It is probably not desirable that every compensation case should come up for a full hearing, even before a board or commission specially trained and

[90] Iowa Code (1913 Supplement), secs. 2477-m 25–33, as amended by Laws 1917, c. 270.

[91] Utah Laws 1917, c. 100, sec. 87.

[92] Idaho Laws 1917, c. 81, secs. 49–55, 57, 60.

dedicated to that sort of work. Such a proceeding partakes too strongly of the nature of a court trial, with its cumbrous machinery and inevitable delay. Where an agreement can be reached between the claimant and the employer, affidavits reciting that fact, and the circumstances of the accident, extent of the injury, etc., should be sent up to the administrative board for approval; if satisfactory and strictly in accordance with law, the settlement out of court should be approved, and the incident ended. If ground for reversal appears on the face of the case, a hearing should be ordered and the question tried in a summary manner by the board, just as if a dispute were involved; for it is essential to the proper operation of workmen's compensation laws that employees be not permitted to sign away their legal rights thereunder, no matter how willing they may be to do so.

The ideal law would also provide for an appeal to the highest or intermediate court of the state; but the policy adopted in many jurisdictions of considering the findings of fact of the administrative board final, and confining appeals to questions of law, seems eminently sound.

(9) Extraterritorial Effect. One of the minor problems, but a very practical one, with which those

charged with the administration of compensation laws have to deal, is that of extraterritorial effect. A typical case is this: the X—— Company, in New Jersey, employs B——, a salesman, to canvass that state and certain towns in Pennsylvania. The salesman sustains an injury arising out of and in the course of his employment in Pennsylvania. Under what law, if any, is he entitled to compensation?

The answer to this problem is that B—— would be compensated according to the law of New Jersey; for the contract of hiring was made there, and New Jersey is one of the jurisdictions applying the *lex loci contractus,* or law of the place where the contract was made, in such cases.[93] Pennsylvania has no jurisdiction of the employer or of the contract of employment in the supposititious case, but the injury was incurred within its boundaries; so it is conceivable that if the claim was originally made under the Pennsylvania act, compensation might be granted in that state, although a prior recovery of compensation in New Jersey would operate as a bar.[94]

A great many compensation laws have no provi-

[93] Rounsaville v. Central R. Co. (1915), 87 N. J. Law 371.
[94] 31 Harvard Law Review, pp. 620–628 (February, 1918).

sion at all for extraterritorial effect.[95] In the absence of such the courts sometimes give full force and operation to the acts (in proper cases) outside the state of origin, as has been done by the highest tribunal in New York.[96] Where the legislature has undertaken to regulate the matter, it is generally provided that compensation may be had when the employee was hired in the state, even if the injury occurred beyond its boundaries.[97]

Extraterritorial effect does not present a problem of very great moment. It is important, of course, that some sure method of procuring compensation be provided in cases of possible conflict of jurisdiction; but as a practical matter judicial construction, in the absence of enabling legislation, has generally secured the plaintiff's rights. Double recoveries are rendered impossible by the holding of the courts that when an injured employee accepts compensation under the law of the state where the contract was made, he automatically waives any

[95] Rhodes, Workmen's Compensation, page 151.

[96] Valentine v. Smith, 168 App. Div. 403, affirmed in 216 N. Y. 763.

[97] *E. g.*, Idaho Laws 1917, c. 81, sec. 62; Utah Laws 1917, c. 100, sec. 65; Texas Laws 1913, c. 179, Pt. I, sec. 19, as added by Laws 1917, c. 103; Nev. Laws 1913, c. 111, sec. 41, as amended by Laws 1915, c. 190. But the Pennsylvania act does not apply to any accident occurring outside of the Commonwealth, irrespective of the place where the contract of hiring was made. Pa. Laws 1915, Act No. 338, sec. 1.

other rights against his employer.[98] For the rare case where suit is brought to enforce the compensation law of another state with regard to injuries received in the latter jurisdiction, provision is seldom made, though Idaho permits recovery in such cases when the claimant's rights can reasonably be determined and dealt with by the local Board and Courts.[99] In almost all such cases, however, the more normal procedure of seeking justice in the state of hiring is feasible and should be encouraged.

(10) Accident Prevention. It is true that the theory of workmen's compensation rests on the assumption that the expense of industrial accidents is part of the cost of the product; but it is a mistake to presume that passive acceptance of conditions is therefore included in the compensation program. Indeed, the opposite is the fact. So far from taking the great number of accidents in modern industry for granted, well-considered compensation laws make either direct provision for accident prevention through the rule-making power given to ad-

[98] Rhodes, Workmen's Compensation, page 152. But where one state is under the old employers' liability system, and the other has a compensation act, and where compulsory acts are involved, the law as to double recoveries is by no means as simple and equitable as Mr. Rhodes intimates. 31 Harvard Law Review 619–636 (February, 1918).

[99] Idaho Laws 1917, c. 81, sec. 62.

ministrative boards, or indirectly encourage the use of safety appliances. The very fact of compensation itself is an encouragement to accident prevention; for when employers are forced to assume the financial burden of the injuries springing from the accidents of industry, their enthusiasm for the elimination of such injuries is naturally increased.

A few instances of explicit statutory provisions regarding accident prevention, taken at random from the mass of compensation laws, will serve to illustrate the methods employed to stimulate interest in the humanitarian side of this labor problem. In Delaware the Industrial Accident Board is charged with the duty of inquiring into causes and results of industrial accidents, and studying the most advanced methods of safeguarding against them.[100] In California, the employer must do everything reasonably necessary to protect life and the safety of employees; and the Industrial Accident Commission is empowered to prescribe rules, establish standards, require use of safeguards, etc., for accident prevention, and impose penalties to enforce the same.[101] Massachusetts *compels* the Directors of the Employees' Insurance Association

[100] Del. Laws 1917, c. 233, sec. 116.

[101] Cal. Laws 1917, c. 586, secs. 34–35, also Laws 1913, c. 177, sec. 18.

to make and enforce reasonable regulations for the prevention of accidents on the premises of subscribers; and gives to the State Board of Labor and the Industrial Accident Board jointly, the *right* to adopt and enforce regulations for prevention both of accidents and industrial diseases.[102]

Statistics available from several compensation states show that about 25% of industrial accidents are due to mechanical causes; and it has also been established that the severity of accidents mechanical in their origin is much greater than the severity of those due to the thoughtlessness and negligence of the worker.[103] The fresh impetus given to accident prevention by the introduction of workmen's compensation resulted in a marked reduction of non-mechanical accidents, due to safety organization and educational methods. A great deal, however, remains to be done in the shape of "mechanical safeguarding"; and proper attention to the design and location of buildings, the arrangement of transportation facilities, the means of access to safety points, proper lighting, and the guarding and replacement of dangerous machines, will con-

[102] Mass. Acts 1911, c. 751, Pt. IV, sec. 18, also Laws 1913, c. 813.

[103] Monthly Review of U. S. Bureau of Labor Statistics, vol. V, p. 112 (October, 1917).

tribute greatly towards the elimination of purely mechanical hazards.[104]

One of the most obvious methods of inducing an employer to bestir himself in accident prevention—raising his insurance rates when he shows a reluctance to employ safety devices—has been availed of surprisingly little in American compensation systems. Private insurance companies have achieved wonderful results by this simple means; yet in statute after statute legislators have clung to a rigid classification of rates according to industries, and have assessed the employer who lavishes time and money on safety appliances on the same basis as the one who grudges the irreducible minimum of effort along that line.[105]

It is true that the problem of finding an agency to which could be left with safety the delicate task of altering the standard rate of insurance in accordance with the insured's efforts along the line of accident prevention, is a perplexing one. Private in-

[104] Ibid., p. 113 .

[105] Washington appeals to the pocket of the employer in a very practical way by providing that if he does not obey a statute or order of the commission as to safety devices or regulations, he is subject to a penalty of 50% of the compensation awarded, this amount to be paid into the accident fund. If the injured employee is responsible for the removal of a safeguard his compensation is reduced by 10%. Blanchard, Liability and Compensation Insurance, p. 139.

surance adjusters and actuaries, however, exercise these functions to-day with distinct success; and it seems not unreasonable to suppose that a State Insurance Commissioner or Industrial Accident Board could be intrusted with this difficult work without much risk of unfair discrimination, and with a salutary effect on dangerous industrial conditions.

CHAPTER V

INSURANCE FEATURES

THE success of any system of workmen's compensation must rest, in the last analysis, on insurance.[1] The individual employer cannot afford to take the risk of being suddenly called on to pay large sums in the form of awards to injured workmen; such a demand, caused by an accident in which many are injured, and coming at a time when ready money is scarce, might conceivably bankrupt even a large concern. A somewhat similar situation existed, to be sure, in the days of common law employers' liability; but several factors tended then to make the need of insurance less pressing. For one thing, the question of liability was tried in a court of law, and the employer, better able to pay for expert legal advice than his opponent, and armed with his special defenses—assumption of risk, contributory negligence, and fellow-servant rule—was often able

[1] See note by the present author on "State Insurance under Workmen's Compensation Acts" in 17 Columbia Law Review, pp. 75–78 (January, 1917); also Blanchard, Liability and Compensation Insurance, p. 207; and 9 Maine Law Review, p. 199 (May, 1916).

to evade responsibility entirely. Moreover, damages, when awarded, being dependent on the whims of a jury, were such an uncertain quantity as to render insurance against them highly speculative, with the result that premiums were often prohibitive.

Workmen's compensation laws have greatly reduced the legal uncertainties inherent in the old system, and have left only the normal risk—that of the occurrence of the injury itself—for insurers to contend with. The shrewd employer of to-day, forced, as he is, to pay compensation practically without regard to the question of negligence, faces a problem somewhat like this: "My factory employs so many hands; even with the utmost care, explosions and other accidents may occur, and may injure a great number of my men. Under such circumstances, the most conclusive proof that I have been blameless will avail me not at all, and I will be forced to pay compensation according to a definite schedule to all my injured employees. Shall I take my chances, carry my own risk, or insure elsewhere?" It is safe to say that nine out of ten such employers would be in the market for insurance almost before they had finished formulating the above proposition.

Heretofore we have assumed that it is optional with employers whether they shall insure or merely stand ready to pay compensation when the accident occurs. But in a large and increasing number of jurisdictions, this option no longer remains. The requirements vary: thus, in New York, Utah, Maryland, Texas, and a number of other states, the employer is at liberty to choose between insurance in stock companies, mutual associations, or a state-managed fund or central association; and furthermore, in the three first-mentioned states sufficient proof of financial responsibility will be accepted in lieu of any of these.[2] In other jurisdictions, there is monopolistic or semi-monopolistic state insurance; while still others maintain no state fund at all, but demand insurance by the employer nevertheless.[3]

The danger of a workmen's compensation act with no provision whatsoever for insurance or security has already been indicated. Sudden large demands on the employer may ruin him; and as the workman's claim under such an act is a personal

[2] N. Y. Consol. Laws, c. 67, sec. 50; Utah Laws 1917, c. 100, sec. 53; Md. Laws 1914, c. 800, secs. 14–15; Tex. Laws 1913, c. 179, Part III, Part IV, sec. 2, as amended by Tex. Laws 1917, c. 103.

[3] See texts of laws, also Digests published by Workmen's Compensation Publicity Bureau.

one against the employer, it follows that the latter's financial collapse spells disaster for the injured man as well. Moreover, a state of affairs which offers such a temptation to speculation by employers on the probability of accidents is not conducive to the financial stability of the industrial world. The following statement by a leading English writer explains this and other weaknesses of the English or "straight compensation" system:

"British law now recognizes, for practically the whole of the employed population, that the employer is liable to compensate the employed for loss of earning power through accident incurred by reason of his employment and to compensate the dependents of a workman for the loss of his support if he dies as the result of an accident during his employment. Our law establishes employers' liability according to a certain schedule, and leaves it at that. For the rest, the employer has to face his tremendous task as best he can, and the workman has to get his compensation out of the employer if he can. The State may thus wash its hands of results, but certain results are inevitable. The employers find it necessary to insure themselves against a great liability imposed upon them by the wisdom of the Legislature. They insure

their workmen with various insurance companies, and the consequence is that in effect the injured workman, or the dependents of a deceased workman, have to deal not with the employer liable under the law, but an insurance company which has underwritten the employer's liability. The insurance company, not being a philanthropic institution, is out to make profits upon the State-imposed liability. It makes those profits on the one hand by charging the employer as much as possible, and on the other hand by paying the workman as little as possible, selling its insurance in the dearest market and buying its workmen's claims in the cheapest, thus fulfilling the law, if not the prophets. There are only 2,000,000 Trade Unionists in the United Kingdom, and but a small proportion of our workpeople are in a position to get advice as to how to proceed under the law. The average workman would as soon think of employing a solicitor as of flying to the moon, and the contest between the uninformed workman and the insurance company, expert in resisting claims, is absurdly unequal. Every year tens of thousands of claims are whittled down or inadequately settled for small, but tempting, lump sums. Moreover, our law puts the onus upon the workman to show that he cannot earn

wages, and the man or woman who loses an eye is hard put to it to get a penn'orth of compensation. . . .

"It appears to me that the German method of dealing with employers' liability is infinitely superior to ours. Germany compels every employer to insure his workpeople at his own cost in a mutual insurance fund, the employer thus merging his risk with the other employers in his trade. What is the result; or rather, what are the results? First, the employer obtains his insurance at cost price, there being no insurance middleman to make a profit out of dire necessity. Second, the employee is assured of compensation, for the insurance institute is under the control of the Imperial Insurance Office. Further, a specific injury, such as the loss of a hand or of an eye, is assured on a specific compensation. Third, and last, but not least, it becomes the direct and the obvious interest of the employers in each trade to keep down the mutual premiums, and they can only do that by making their mills and factories safer working places. If a trade hits on a new safety appliance, it means a lower insurance premium for the trade." [4]

In the present stage of thought, the main thesis

[4] Money, Insurance vs. Poverty, pp. 52–54.

of the foregoing extract—that "pure" workmen's compensation, without any provision for insurance, is fatally defective—is regarded as axiomatic. In the few of our states which still cling to the old plan, there are increasing protests among the enlightened. But there is a real clash over the *methods* of insuring, the agitators being mostly divided between two camps—the advocates of compulsory state insurance or compulsory insurance in mutual associations under close governmental supervision on the one hand, and the representatives of the private insurance companies who want competitive bidding for compensation business on the other.

To the private insurance companies the matter is naturally one of immense importance, and an enormous amount of literature has been published and distributed in the hope of checking the tendency, if tendency there is, towards compulsory state insurance. The Workmen's Compensation Publicity Bureau in New York City, supported by the insurance companies, has been the most active and efficient agency for the dissemination of their ideas on the subject; and the Workmen's Compensation Service Bureau, through its actuarial activities in a wide field, has furnished the stock companies with the weapons to fight state insurance, both in the

forum and the arena of active competition. The monopolistic state insurance acts of Washington, Oregon, Nevada and Wyoming; the semi-monopolistic laws in force in Ohio and West Virginia; and even the state funds maintained in competition with private insurance, which we find in New York, Idaho, Maryland, Michigan, Montana, Utah, and some other states, have been the target of fierce attacks. Every argument impugning the apparent state socialism of these laws, and many more based on the peculiar nature of the business, have been utilized by the stock companies and their ingenious advocates.[4a]

On the other hand, state commissions and other presumably unbiased investigators have shown a strong tendency to favor state insurance above all other forms of security for awards. On the question of whether state funds should be monopolistic there is by no means the same agreement. In New Jersey, for instance, the Reports of the Employers' Liability Commission for 1914 and 1915 urge the introduction of compulsory insurance, but add that

[4a] That the private insurance interests have strenuously and consistently opposed attempts to inaugurate state insurance, see Wilson, Workmen's Compensation and Employers' Liability Acts, p. 66; Clark, Constitutionality and Construction of Workmen's Compensation Laws, p. 286.

"the establishing of a State Fund would seem to be essential to ensure equitable rates on the part of the privately owned companies and associations, *and to prevent the establishment of a monopoly*, by agreement or otherwise, by these companies." The impression, indeed, seems to be widespread that competition, or potential competition, by the state in the field of workmen's compensation insurance, is chiefly useful in keeping other carriers on their good behavior. Those who hold this view, however, are to be reckoned among the supporters of state funds, and as answering the venomous strictures of outraged private insurance with a point-blank refusal to tolerate the unrestricted domination of the great public field of compensation insurance by organizations having a pecuniary interest in the maintenance of high premium rates and the disallowance of claims.

A very real problem is presented by the insufficient provision too often made for future liabilities of state funds, where they exist. One of the gravest dangers lurking in the way of all experimenters in insurance is the tendency to collect small premiums to pay for current losses only, and not accumulate sufficient reserves to meet deferred claims. Politicians in state legislatures, afraid of offending

the employing classes by exacting large payments, are especially likely to be victims of this fallacy; and there has been a regretable tendency to incorporate these errors into the State insurance funds, many of which, from an actuarial standpoint, are said to have been insolvent from their inception.[5] To those who point the finger of scorn at these transgressions, the advocates of state-managed insurance can only say, that such faults are to be condoned in a system scarce out of its swaddling clothes; that at least no serious catastrophe has yet occurred, and improvements are already perceptible; and that in time, and with the coöperation of those experienced actuaries who are as yet kicking against the pricks in a vain endeavor to avert the inevitable substitution of state for private insurance of compensation awards, the last of the disquieting features of amateurish and speculative dealing with state funds will disappear, and the system become established on a sound and permanent business basis.

One of the most frequently voiced objections to state insurance is that it puts into the hands of political officials what is essentially a matter of pure business administration. As one writer has

[5] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.), pp. 63–64.

phrased it: "Should insurance as a system, now closely supervised by the State, be taken away from present agencies of great skill—the insurance companies of to-day—and be remitted to our American system of politics, partisanship, and pull?" [6] Similar expressions, showing a lamentably low opinion of the integrity and efficiency of American officialdom, occur in many publications on the subject.[7] To establish their contention, these writers have cited a number of circumstances in which management by officials has been notoriously incompetent. For example, it is said that state insurance never results in a proper differentiation of rates, as illustrated by the case of Norway, partly because officials are afraid that they would arouse suspicions of favoritism if they should attempt to discriminate between particular establishments, and partly because the endeavor to attain a cheap administration compels them to dispense with the inspection force

[6] See article by William H. Hotchkiss on "The Case against State Insurance" in The Outlook, vol. 103, pp. 487–490 (March 1, 1913).

[7] For similar expressions of distrust, see address by F. Robertson Jones, delivered at the Temple University, Philadelphia, Pa., Dec. 15, 1915, on "Case against State-managed Insurance under Workmen's Compensation Laws," at p. 12; pamphlet on Advantages and Disadvantages of Insurance in the New York State Insurance Fund (Feb. 1916), at p. 15; pamphlet by R. D. Steele, Shall the State Engage in the Insurance Business? (Dec. 1911).

necessary to differentiate rates successfully.[8] Again, the claim is made that the almost autocratic power given to the officers in charge of a state insurance fund results in a tendency on their part to distribute charitable relief or political favors at employers' expense.[9]

On the other hand, the records of the casualty companies themselves have been far from clean. A former superintendent of insurance of New York State admits the "questionable practices which were formerly resorted to" by some of the corporations underwriting employers' liability insurance. The common law, however, with its encouragement of litigation by leaving to courts and juries the amount recoverable by an injured employee, is said by this writer to be chiefly responsible for the unpopularity of these companies—an unpopularity so great that their mere inclusion as one of the four groups of carriers between which an employer might elect under the New York compensation act, caused a storm of protest. "Definite and certain compensation for each kind of injury," we are told, will put an end to "the controversies which have been in-

[8] See "A Resumé of the Arguments against State Insurance," Revised and Reprinted Jan. 1914, by Workmen's Compensation Publicity Bureau, pp. 12–13.

[9] Ibid., p. 14.

evitable" under the old system of employers' liability; and the casualty companies should be left at least "the bare right to struggle for existence a little while longer in competition with newer—and, as some people claim, better forms of insurance." [10] A pitiful plea!

The statements just quoted are those of an apologist for the private companies, but they represent the views of that large group of insurance men who, besides being sufficiently confident of the efficiency of their system not to be afraid of fair competition by the State, are willing to concede the bracing effect on all carriers of a battle with state and mutual insurance. But the disparagement of state insurance and all inteference with what is called "the private concern of the casualty companies" is by no means silenced, and finds voice in a review of the workmen's compensation situation in 1916 by a prominent insurance man:

"As a whole, the State funds have accomplished nothing to demonstrate their usefulness during the year. In some States these State funds have made decidedly bad records, and this is particularly true of States in which a State fund monopoly has been

[10] Memorandum submitted to the Governor in the matter of the Senate Insurance Committee's Workmen's Compensation bill, May, 1913, by the Superintendent of Insurance (Hon. William T. Emmet).

attempted. . . . The companies are undoubtedly harassed to an unreasonable extent in some directions by what may be called 'too much government.'" [11]

The detailed criticism of the State funds—the reasons why insurance in them is less desirable for all parties concerned than insurance in the casualty companies, according to the advocates of the latter—can only be touched upon here. One ingenious critic has suggested that a policy in the state fund in New York gives incomplete protection to the employer, because it only insures against his liability under the compensation law, leaving all his other possible liabilities (which the writer proceeds to enumerate) uncovered; a contention which seems easily answered by stating that that is all such a policy was intended to do, and that the casualty companies should be glad to have the residuary risk left them to insure! [12] The old cry that "public service

[11] See article in Financial section, New York Times, Dec. 31, 1916, by Walter G. Cowles, vice-president Travellers' Insurance Company, at p. 17.

[12] The quotation is from P. Tecumseh Sherman's "Advantages and Disadvantages of Insurance in the New York State Insurance Fund" (Feb. 1916), pp. 5 et seq. My criticism of Mr. Sherman's arguments may be unfair if his real thesis is that *for an equivalent investment* the stock companies give more complete protection than the state fund; but if the gist of his contention is that the state is at fault in not undertaking to insure against *more* risks, it is irrecon-

is inferior to private service both in quality and convenience" is often reiterated,[13] and may be dismissed with the remark that the United States Parcels Post is a striking illustration to the contrary. An argument worthy of more consideration is that under state insurance a "flat" rate of premium, not adjusted to the risk of the particular establishment, is likely to be adopted; with the result that "the individual employer is freed from any economic inducement to prevent accident, since his competitors must share with him pro rata any loss thereby incurred." [14] It is true that there is a tendency in state insurance acts, and in the administration of them, to follow the line of least resistance and treat all members of one trade class alike, regardless of the degree of zeal for accident prevention displayed. In extenuation it may be said that since the state by statute compels adherence to certain safety regulations, complete disregard of the employees' well-being even by the most conscienceless employer is

cilable both with his bias toward private insurance and his specific arguments with regard to the dangers of permitting the state to undertake to insure at all.

[13] *Ibid.*, p. 16.

[14] See pamphlet by Edwin S. Lott, "What Will Be the Best for the Workman?" p. 13; also Address by J. W. Lord on "Employers' Liability and Workmen's Compensation Laws," delivered at the 17th annual meeting of the Maryland State Bar Association, July, 1912, at p. 22.

impossible; but, of course, an ideal law would encourage *voluntary* effort along humanitarian lines. State insurance laws, however, do not necessarily impose flat rates; and there is reason to believe that, as the industrial commissions grow in wisdom and experience, they will follow more and more the lead of the casualty companies themselves in differentiating between individual employers, leaving a wider discretion in the administrative officers, to the end that enthusiasm for accident prevention may be encouraged.

Of course, the attention and credence which the various arguments against state insurance, that I have discussed, will receive, depends largely on the reader's bias. As they are rooted in prejudice, and nourished on the ingenuity of special advocacy, it is to be expected that those who meet state socialism more than half-way will be ready with flat denials, and theoretical arguments of equal force if a different premise be conceded. The literature of defense is somewhat less accessible than that of criticism, but the following account of experience with the California state-managed fund, which is operated in free competition with private companies, is enlightening in view of the scornful comments on official ineffectiveness:

"In spite of a most strenuous competition of 25 corporate companies and several inter-insurance carriers, the business written by the Fund exceeded all expectations. . . . The mere establishment of the fund caused compensation rates for the year 1914 to be reduced about 25 per cent. Its experience during the past 12 months has demonstrated beyond question that the rates fixed for California by the Workmen's Compensation Service Bureau have been too high. . . . To secure 1915 business, one of the stock companies has announced a flat reduction of 30 per cent. in rates. Others are carrying risks for a month or more free of charge. . . . Several companies have already withdrawn from the field. The fund, however, even with a greatly increased office force, has been unable to keep up with the business which has come to it with the opening of the new year." [15]

The report of the California Industrial Accident Commission for the year ending June 30, 1915, showed the Fund approximately $144,000 ahead of its nearest competitor in net compensation insurance premiums; the department stating that "it has now been demonstrated beyond a doubt that it is

[15] Ira B. Cross in The Survey, vol. XXXIV, pp. 173–174 (May 22, 1915).

possible for the State permanently and economically to conduct an insurance enterprise." [16]

And finally, the Industrial Accident Commissioner's report for the year ending June 30, 1916, says: "That the State Compensation Insurance Fund of California has proved a pronounced success is now generally conceded by all who have been in a position to watch its progress. Since the end of its first year, when its volume of compensation premiums exceeded that of any other insurance carrier operating in the state, its commanding lead over competitors has steadily increased and its assets have grown to an amount exceeding $1,000,000." [17]

The statement has so often been made, that no state-managed fund can survive in fair competition with the established private companies, that the passage just quoted is especially significant; for, of all the American jurisdictions which have state insurance of workmen's compensation, California has adopted the fairest regulations as to competi-

[16] Report of California Industrial Accident Commission, July 1, 1914, to June 30, 1915, reviewed in Monthly Review of U. S. Bureau of Labor Statistics, vol. II, No. 5, pp. 51–54 (May, 1916).

[17] Report of California Industrial Accident Commission (see text); reviewed, Monthly Review, U. S. Bur. of Labor Statistics, vol. IV, No. 3, p. 409 (Mar. 1917).

tion.[18] The State Insurance Commissioner is required to issue a uniform classification of risks and premium rates, which must be adhered to by all compensation carriers, including the State fund.[19] Underwriters all start on an even basis, and the fact that the State fund has been able practically to crowd private companies out of the field of compensation insurance, is a striking refutation of the aspersions on official incompetence.

The report of the Maryland commission on the operation of the workmen's compensation law for the year ending October 31, 1915, also throws light on the success of a state accident fund in competition with private insurance. Only 7 per cent. of the business was underwritten by the State fund; but the appearance of this new rival seems to have put the fear of God in the hearts of the insurance companies, for premium rates were reduced about 15 per cent.[20]

In Massachusetts there is no genuine state insur-

[18] See author's note in 17 Columbia Law Review 75–78 (Jan. 1917). Insurance concerns in California are permitted to operate under conditions which would prevent their getting licenses in many states. Report of Cal. Industrial Accident Comm., July 1, 1915, to June 30, 1916, at page 26.

[19] Cal. Laws 1915, c. 642.

[20] First Annual Report of State Industrial Accident Commission of Maryland, for year Nov. 1, 1914, to Oct. 1, 1915.

ance; but an Employees' Accident Insurance Association, operated on the mutual plan, in competition with other mutual and stock companies, is created by the compensation law.[21] For the two and one-half years from July 1, 1912, to December 31, 1914, the total expense of operation of the stock companies was 32.81% of earned premiums in 1912, 35.68% in 1913, and 36.33% in 1914, while the percentages for the mutuals were 14.17, 17.02 and 17.37 for the same periods.[22] These discrepancies were so serious as to arouse suspicion both that premium rates were exorbitant and that a monopoly or combination to fix rates existed among the insurance companies; and accordingly a commission of investigation was appointed by the legislature of 1914.[23] The investigators reported that practically all the stock companies writing insurance in the state were members of the Workmen's Compensation Service Bureau in New York City, and had authorized a single man to change compensation rates for Massachusetts alone for competitive purposes—an arrangement characterized as "indefensible." Under this plan, however, premium rates, which had been

[21] Mass. Acts 1911, c. 751, Pt. IV.

[22] Monthly Review of U. S. Bureau of Labor Statistics, vol. II, no. 5, p. 55 (May, 1916).

[23] Mass. Acts and Resolves 1914, c. 160 of Resolves.

scandalously high formerly, had been materially reduced, though some sort of equalization was needed. The necessity of state supervision and regulation is strongly affirmed by the Commission.[24]

Another state which has found mutual insurance more economical than that conducted by stock companies is Wisconsin. The Industrial Commission stated under date of June 1, 1915, that if all compensation insurance during 1914 had been carried in Wisconsin mutuals the net saving to employers would have been over $500,000 of the premiums actually paid.[25] A table of expense benefits shows that Wisconsin mutuals paid 60 cents on the dollar, in benefits to workmen, as against 48 cents by stock companies; 22 cents as surplus to policyholders as against the private insurers' 14 cents to stockholders; and only 18 cents were spent on agents, adjustments, and all other expenses, whereas the stock companies paid 38 cents for those purposes.[26]

In its very first report, the Iowa Industrial Commission bewails the "oppressive insurance premiums charged by the private companies." In coal mines,

[24] Monthly Review (supra), vol. II, no. 1, pp. 45–48 (Jan. 1916).

[25] Wis. Industrial Commission, Workmen's Compensation Insurance Bulletin, issued June 1, 1915, and reviewed in Monthly Review of U. S. Bureau of Labor Statistics, vol. II, no. 1, pp. 53–62, especially p. 54 (Jan. 1916).

[26] Ibid., p. 55.

for instance, the basic rate was $6.50 per $100 of pay roll as compared with $1.50 under the State fund plan in Ohio. The Commission says: "A collective fund administered by the State is a remedy for all these evils and inequalities. Such a system would make an end of excessively high rates." [27]

The Montana compensation law, which provides for state insurance in competition with both mutual and stock, has not only brought about a reduction in rates, but, according to the commission which administers it, has obtained a superlative degree of success: "Only two assessments were levied against these firms during the year at a total cost to employers of a little more than one-half of one per cent. on their annual pay rolls, 'which perhaps represents as low an insurance cost to employers operating under compensation laws as exists anywhere in the world. Yet, despite this low premium cost, a surplus of $22,684.56 has been accumulated in the fund which represents three times the amount that has been paid out.' " [28]

Some of the difficulties which attend upon the initiation of such a novel scheme as state insurance of

[27] Monthly Review (supra), vol. II, no. 2, pp. 61–63 (Feb. 1916).
[28] Monthly Review (supra), vol. III, no. 6, pp. 22–26 (Dec. 1916).

compensation awards are illustrated by the experience of the West Virginia Public Service Commission. The premiums for the first three years in the mining industries, estimated to have been ample to provide for all liability growing out of accidents during that period, proved greatly inadequate, owing to an increased number of permanent and fatal injuries, especially in the Eccles mine disaster of April 28, 1914. The maximum rate of premium under the law was $1 per $100 of pay roll; but the loss ratio for the first 9 months was $2.08 per $100. To overcome the deficit a rate of $1.89 per $100 will have to be assessed in the coal-mining industry for a period of four years; and in mining other than coal an average rate of $1.54 per $100 of pay roll will be required. Such miscalculations lend color to the contention of the private companies that inexperience will seriously handicap state insurance; but the disasters with which the West Virginia fund has had to cope are of such rare and exceptional nature as to warrant the belief that a very little more elasticity in the powers of the administrative commission will prepare it for any contingency.[29]

The Ohio State Insurance Fund is one of the

[29] Monthly Review (supra), vol. II, no. 2, pp. 76–81 (Feb. 1916).

oldest and most successful of its kind. In its Statement of Condition, under date of May 15, 1916, are collected statistics which present a triumphant refutation of the criticisms of unbusinesslike management levelled against the system by its enemies. The Fund is "in an ideal condition of solvency": and a comparison of its current rates for 82 representative industries with those of liability insurance companies in neighboring states shows that the Ohio system effects a great saving for the employer. Taking the charges of the Fund as 100%, the percentages of the States examined are: Pennsylvania, 137; Indiana, 157; Michigan, 160; Illinois, 201; Wisconsin, 215; Kentucky, 225; Ohio (stock companies), 232. These amazing differences are partly explained by the fact that the Ohio plan has been operated at an expense ratio equivalent to 11% of the earned premiums as compared with an expense ratio of the liability companies of 45%.[30]

"The claim of superior service advanced by the stock companies is without foundation in fact," is the statement made in a publication of the New York State Insurance Fund and indorsed by the Industrial Commission.[31] To this may be

[30] Monthly Review (supra), vol. III, no. 3, pp. 60–63 (Sept. 1916).
[31] Monthly Review (supra), vol. II, no. 4, at p. 64 (April, 1916).

added the pointed reference made by the superintendent of insurance in his 1915 report to "the higher cost of stock insurance with its agency expense," as proof of the growing recognition of the fallacy of one of the chief arguments against the state plan.[32]

Indeed, the New York State Insurance Fund charges rates that average 20% lower than those of the casualty companies, and has paid dividends averaging 20% of the first policy term and 15% on the second.[33] The high degree of security offered to employers and employees is another great advantage; and the charge that politics have played any part in the administration of the New York fund is declared to be unfounded.[34]

A suggestion of inexpertness in the drafting of the compensation law of Nevada is conveyed by the report of the operation of the act for the 30 months ending December 31, 1915. The framers intended that 10 per cent. of premium income should be set

[32] Preliminary text and tables, 57th annual report of superintendent of insurance, covering transactions of calendar year closing Dec. 31, 1915. Reviewed, Monthly Review (supra), vol. II, no. 4, pp. 64–66 (April, 1916).

[33] See article by F. Spencer Baldwin on "Advantages and Disadvantages of State Funds in Workmen's Compensation," in Amer. Labor Legislation Review, vol. IV, p. 3 (March, 1916).

[34] Ibid., pp. 5, 10.

aside for the purpose of creating an insurance reserve fund to provide for and absorb the shock of a catastrophe without doing violence to the general fund; but during the period covered by the report receipts fell short of being sufficient to create this reserve by $16,790.21, or nearly one-third of the amount needed. That is to say, the actuarial calculations of the framers failed in operation to meet the current demands, and the resultant shortage had to be made up out of the fund designed as a reserve, though there appear to have been no particularly heavy casualties to account for the situation.[35] As Nevada is one of the states in which monopolistic state insurance obtains, these official errors are fair game for the enemies of the system.

For the most part, however, the reports we have reviewed are a record of success for state insurance, even under the test of severe competition with the established private carriers. We are far from overlooking the element of bias in the statements of officials charged with the success of the system; but we are unable to avoid the conclusion, from the facts and figures set before us, that in actual operation state insurance has given the lie to those who

[35] Monthly Review (supra), vol. III, no. 3, pp. 55–58 (Sept. 1916).

accused the theory of fatuity, and its administrators of corruption and inefficiency.[36]

There is no attempt to disparage the excellent work done by the private companies along lines of actuarial calculation, accident prevention, etc. Without this expert smoothing of the way, the undertaking of insuring compensation awards would have been a dangerous venture for governmental agencies. I have before me now a pamphlet of 174 pages entitled "Safeguards," profusely illustrated, with illuminating text, devoted wholly to practical suggestions for the operation of industrial plants with greater safety to the toilers, explaining the most modern and effective devices for safe-guarding machinery as well as the precautions the workman himself should take in handling it. This is a publication of the Ætna Life Insurance Company.[37] The Monthly Review of the United States Bureau of Labor Statistics for November, 1916,

[36] Of course, there have been some falls from grace. Gov. Whitman of New York, in an Emergency Message to the Legislature under date of Feb. 3, 1915, which has been seized on with avidity by the enemies of state insurance, accuses the Workmen's Compensation Commission of "gross extravagance and waste." German compensation insurance, and particularly the Imperial Insurance Office, has been severely arraigned by Dr. Ferdinand Friedensburg, a former president (The Practical Results of Workmen's Compensation in Germany, 1911).

[37] Safeguards (for the prevention of Industrial Accidents), edited by David Van Schaack (Hartford, Conn.: Ætna Life Ins. Co., 1910).

comments on the activity of the Workmen's Compensation Service Bureau, an organization supported by a group of insurance companies, in analyzing the statistics of accident losses with a view to ascertaining the lowest practicable compensation rates.[38] Such work cannot be too highly commended.

But it is difficult to see why this success of private companies in preparing the ground should be an argument for the continuance of compensation business in their hands, after the social cost of some other system has been proven to be less. Vested interests should be protected so far as is consistent with the public good; but we are far from admitting that private companies have acquired such a claim on the traffic in compensation insurance that the combined interests of employer, employee, and consuming public should be subordinated thereto. There is some force in the plea of the stock companies to be allowed to compete, though competition tends to undermine security by reducing rates below the margin of safety, and by inducing extravagant selling costs;[39] but none in the demand that

[38] Monthly Review of U. S. Bureau of Labor Statistics, vol. III, no. 5, pp. (629)–(631), (Nov. 1916).

[39] See "Plea for an Open Field" in The Independent, vol. LXXIV, p. 788 (April 3, 1913); also "State Insurance," an address by Arthur

the state shall wash its hands of compensation insurance.

In this connection the claims of the mutual system to our attention must not be overlooked. No less an authority than Dr. Rubinow, after advocating "a freedom of choice between stock casualty companies, mutual associations, and state insurance funds," has stated that "European experience has conclusively shown that when such competition is permitted, mutual associations slowly but inevitably grow at the expense of all other insurance institutions." [40]

This claim does not seem wholly to be borne out in the experience of our American states—thus, in New York, "notwithstanding the higher cost of stock insurance with its agency expense, the employers, as a whole, seem to prefer that form of protection," 76 per cent. of the workmen's compensation risks having been carried by stock companies, 13 per cent. in the state insurance fund, and only 11 per cent. by mutual companies during the year 1915.[41] In California, as we have seen, state in-

I. Vorys before the Insurance Federation of Ohio, Cincinnati, Feb. 26, 1914. But see 24 Journal of Political Economy, pp. 958 *et seq.*, for an account of the dangers of competition among workmen's compensation insurance carriers.

[40] Rubinow, Social Insurance, p. 187.

[41] Preliminary text and tables, 57th annual report of the super-

surance has been carrying all before it, both mutual associations and stock companies being forced into the background. A recent review of the compensation situation puts the business of all the mutual compensation companies at not more than 5 per cent. of the premiums paid for workmen's compensation insurance in the United States during 1916.[42] It is only in Massachusetts and Wisconsin that mutual insurance, regulated in many details by the state, has been having a really triumphant progress, as already described. In those states, it will be noted, there is no state-managed insurance; so the best that can be said for the mutual plan, in the light of the meager American experience, is that in the few instances in which it has justified itself its elimination of the element of private profit has enabled it to compete successfully with the ordinary casualty companies.

It may be that the State insurance of the future will expand the principle of mutuality (a principle already recognized in the Oregon compensation law[43]), by calling on employer and employee alike

intendent of insurance of New York, covering transactions of calendar year closing Dec. 31, 1915. Reviewed in Monthly Review (supra), vol. II, no. 4, pp. 64–65 (April, 1916).

[42] See footnote 11.

[43] Oregon Laws 1913, c. 112, sec. 19.

to contribute to the Fund; but nothing that has as yet been revealed has really discredited the State as an underwriter in favor of "pure mutuals." The superior stability of a state-managed fund, its economy, the public interest in the subject-matter, and the moral responsibility of the commonwealth for the fund's solvency, (a responsibility, we insist, that would cheerfully be shouldered in case of need, despite the legal barriers which some legislatures have seen fit to erect against its enforcement), are all reasons for placing workmen's compensation insurance in the hands of government agencies, against which the arguments springing from pecuniary bias or un-American distrust in the honesty and capacity of officials of the people's choice cannot long prevail.

Economy has been mentioned as among the positive advantages of compulsory monopolistic state insurance. A cautious writer has estimated that stock companies in the United States absorb at least 60 cents for every dollar of compensation benefits actually reaching the injured party; and even large and well-managed mutuals maintain an expense ratio of from 30 to 35 cents.[44] In the Ger-

[44] E. H. Downey in 24 Journal of Political Economy, pp. 977–978 (Dec. 1916).

man Empire, on the other hand, the cost of administration is only 16 per cent of the benefits paid; in Norway, 15 per cent; in Ontario, 13 per cent; and in the State of Washington, 9 per cent.[45] As some form of monopolistic state insurance is in force in all of these latter jurisdictions, the significance of the low expense ratios is at once apparent.

Competitive waste is in large measure responsible for the costliness of the haphazard methods of insuring compensation awards that prevail in most of our states. It is said that employers in New York State pay about $5,000,000 annually for the "luxury of competing insurance"; and that for the same premiums, under an economical centralized management, fully 25 per cent could be added to the aggregate of compensation benefits.[46] The elimination of selling costs is the chief saving accomplished by monopolistic state insurance; and when the obligation to insure is compulsory on all employers, there is no economic justification whatever for the solicitation which is a concomitant of the competitive system. A certain duplication of administrative staffs, claim adjusters, and so forth, is also done away with when the State takes over the exclusive control of compensation insurance.

[45] Ibid.

[46] Ibid., p. 979.

The superior security of the monopolistic state-managed fund is another of its advantages. Its subscribers cannot withdraw at will, and the power of assessments in a group of establishments of any considerable size will always suffice to meet accruing payments to workmen on account of accidents. Premiums can be kept low enough to cover only current disbursements, and yet the fund will be solvent; for if the number of accidents increases, an increased rate or special payment may be exacted without hardship because of the large number of establishments among which the burden will be distributed. The conjectural element, so much of a problem to private insurance carriers, who must fix their rates in advance and cannot resort to the assessment panacea, is absent.[47]

It is because the day of reckoning in work accident insurance is so long postponed that the reduction of rates below the margin of safety by carriers bidding against each other and underestimating the magnitude of the deferred liabilities, is an ever-present danger of the competitive system. The fiddler must be paid in the end; but the insurance companies are meanwhile "free, so far as cash obligations go, to demoralize their rates and waste their

[47] Ibid., pp. 963–964.

substance in fancy salesmanship."[48] When the state steps in, with its control of both reserves and rates, and with the whole volume of compensation business in the hands of a single responsible carrier, a stability is attained which is impossible under a system that tempts small companies, liable to be wrecked completely by a single great disaster owing to the inconsiderable volume of their business and the consequent insufficiency of their reserves, to count on a loss ratio no worse than the average.[49]

Compulsory state-managed insurance is not only superior to competitive insurance in security and economy, but it makes for a more equitable distribution of accident cost. Competition leads to an infinite subdivision of risk classes. The less hazardous members of a group are singled out at once by carriers eager to underwrite their risks; less attractive clients are served by some companies and scorned by others; until the members of a homogeneous group of employers in a given industry are scattered so widely among the various carriers that anything like accurate data upon which to base sci-

[48] Ibid., p. 958. Statistics from Massachusetts and Michigan are cited by Mr. Downey to show the disastrous situation brought about by rate-cutting by competing carriers. See also The Annals, vol. LXX, p. 308 (March, 1917).

[49] Ibid.

entific premium rates is wholly unobtainable. Conjectural rates are resorted to, resulting unavoidably in unfair discrimination between risk classes, and in temptation either to charge individuals too little in order to undermine the business of a rival, or too much on the principle of exacting all that the traffic will bear. These conditions are the more apt to prevail because the bulk of insurance is sold through solicitors, who are paid on a percentage basis and are therefore interested solely in the volume of premiums, and not at all in the adequacy or equity of rates.[50]

The remedy for the evils we have described is not governmental supervision, for the best that the supervising authority can do is to take the combined results of the experience of the various companies and substitute its judgment for that of the skilled underwriters who already have the matter in hand. Doubtless some good can be accomplished by state regulation, especially where it comprises all carriers and is authorized to apply "merit rating" to individual risks; but risk classes under competitive conditions never have a sufficient exposure to enable anybody to determine a proper rate from actual experience. Moreover, the flexi-

[50] Ibid., p. 970; see also Gephart, Insurance and the State, p. 187.

bility which is cited as the chief advantage of private insurance disappears with too rigid regulation.

The establishment of monopoly, on the other hand, "greatly lessens the pressure toward minute splitting up of risk classes . . . and makes possible a retrospective rating system whereby accident cost is measured by actual outlays." [51] The retrospective (or assessment) plan results automatically in distributing the abnormal loss of a catastrophic year in an industry over a whole generation, and makes possible the application of the "principle of occupational risks to much smaller industrial groups than is possible to competitive insurers." [52] It is true that many state funds have failed to take advantage of the possibilities for scientific risk classification which the possession of their monopoly renders available, and have clung to the fallacious "capitalized-reserve" plan. But the door to better things is opened when compulsory state-managed insurance is adopted, and with a combination of intelligence and impartiality in administration an infinitely more equitable distribution of accident cost is possible than under competitive conditions.

The author has stated elsewhere, and here re-

[51] Ibid., p. 972. [52] Ibid., p. 973.

iterates most emphatically, that workmen's compensation can serve no higher purpose than the prevention of industrial accidents. Devised primarily to bring about a more just distribution of a burden, its utility increases a thousandfold if it also serves to lessen the weight of that burden. Indeed, that form of compensation administration which brings about the greatest reduction in accidents may fairly be said, without further examination of its merits, to have made the greatest contribution to social welfare.

The proper study of the insurance carrier in this field has been said to be to "stimulate prevention both by advice and instruction, and by furnishing a pecuniary incentive in the way of merit rating." [53] The employer, who alone controls working conditions, is primarily to blame if they are unsafe and unsanitary; and much may be done by awakening him to a sense of his social responsibility through propaganda and well-directed public opinion. Much, too, has been and will be accomplished by safety appliance acts and other forms of legislative interference; but when all is said, the influence exerted by measures directly affecting the employer's pocketbook constitutes the most powerful weapon

[53] Ibid.

that can be wielded in behalf of accident prevention. It is here that the insurance carriers, through their control over rates, have the greatest opportunity for public service.

Under competitive conditions, "merit rating"—that is, the adjustment of premiums by the carrier so that that employer is charged the least whose record shows the smallest proportion of accidents, or whose adoption of safety appliances augurs best for the welfare of the workers—is apt to be conspicuous by its absence. There is no inducement to install safety devices when the employer knows that, if one liability company attempts to raise the rates, another will always be ready to write his business at the old rate or a lower one.[54] Once a risk is taken, of course, no carrier is blind to the advantages of kindling the zeal of the insured for measures which will lessen the probability of a payment having to be made; and the excellent work of some of the stock companies in instructing workmen and employers in safety measures has already been adverted to in these pages. But the faults of a prospective customer are apt to be overlooked in the scramble for business among competing concerns, and the same haphazard subdivision of risk

[54] Gephart, Insurance and the State, pp. 187–188.

classes and speculative rate-making which have made competitive workmen's compensation insurance the foe of equitable distribution of accident burdens among employers, militate against the adoption by rival liability companies of any rational policy of accident prevention.

The fact that private insurance is discredited as a force for reducing accidents does not, however, point to state insurance as the only solution. Some doubt may well be felt as to the comparative merits of the compulsory trade mutual and the state monopoly in this respect; and one able writer favors the former as a practical agency for furthering the cause of accident prevention. This authority gives as his reasons that the members of a compulsory trade mutual have the knowledge of trade conditions necessary to draft proper standards; that the association itself is under no competitive pressure either to lower the standards or to remit the penalties for non-compliance; and that the difficulty experienced by an insurance carrier covering diverse industries, in that one particular employing group is constantly besieging the carrier to tone down the safety standards and reduce the schedule charges in order to obtain a differential advantage in basic rates or in merit rating, is done away with where

each trade has its own mutual insurance association and the members are "collectively and inescapably responsible for the accident cost therein." This same author concedes, however, that many of the advantages of the trade mutual may be gained by a compulsory state fund divided into industrial sections with a collective interest and a technical relation to accident insurance like the German mutuals.[55]

It will, we think, be conceded by any unbiased student of compensation insurance, that fairness to the individual employer and efficiency in accident prevention can only be obtained by charging a rate of premium based on the zeal or success of the employer in keeping the percentage of disabling accidents to his workmen at a low ebb. Merit rating, however, is not a proposition devoid of complications. Rival schools exist which advance radically different theories. Thus, one group insists that the physical character of the individual risk should be the sole criterion of the rate to be charged; while it is just as ardently urged on the other hand that the loss experience for a given risk during a given period should be subjected to detailed analysis and appraisal, and the class or basic rate modified in

[55] Mr. Downey in 24 Journ. of Pol. Econ., pp. 975–976 (Dec. 1917).

accordance with this experience. The first of these systems is called "schedule rating"; the other is known as "experience rating." [56]

Where the former scheme is in force, the underwriters depend upon a "schedule," in which a complete analysis of the average manufacturing plant and the normal items of hazard productive of industrial accidents is made, covering, among other things, the type of building construction, existing facilities for safety of employees against fire and panic hazard, the condition of floors, hoistways, stairs, boilers, etc. Standard methods of safeguarding machinery and equipment, of instructing employees in accident prevention, and of improving the sanitary condition of the premises, are also outlined in the schedule. With proper allowances for catastrophe hazard and peculiar risks in a given industry, the individual employer's establishment is then compared to the average or "schedule" plant, and the premium rate set higher or lower as the existence or absence of unusually dangerous conditions is established. The employer's direct pecuniary interest in the installation of safety devices is thus made apparent.[57]

[56] Leon S. Senior in The Annals, vol. LXX, pp. 264, 269 (March, 1917).

[57] Ibid., pp. 264–265.

"Experience rating" is what its name indicates. The loss experience of the employer for a given period is subjected to analysis, and the rate of premium modified in accordance therewith. On behalf of this system it is urged that schedule rating can only take account of the physical conditions of the risk, and that moral conditions which account for high accident rates in some plants whose physical attributes are ideal, can only be covered by a rating based on actual results. It is also stated that schedules have not been sufficiently developed to take care of other than manufacturing risks.[58] Nevertheless, the balance of expert opinion seems to be in favor of accident rating; and the reasons are given by Mr. Downey:

"Experience rating provides a certain incentive to accident prevention because it makes the establishment rate depend in part upon the number and severity of injuries actually sustained in that establishment during a given period, but it furnishes no guidance in methods of prevention, which often is the larger half of the problem. Schedule rating combines incentive with instruction; it provides definite standards of mechanical safeguarding, working methods, and (most important of all) the

[58] Ibid., p. 269.

education of workmen in 'safety first,' while at the same time it penalizes unsafe conditions and practices." [59]

There are two methods of insuring compensation which must be mentioned here, because they have received legislative sanction in some States, though neither commends itself to a dispassionate mind. These are self-insurance and reciprocal or inter-insurance. The former has been summarily disposed of by a recent writer in the phrase "Self-insurance is really non-insurance"; [60] and it is indeed difficult to see how state inspection of compensation carriers can be effectively administered, when each employer may be his own insurer. Reciprocal insurance, managed through an attorney-in-fact who is really an irresponsible middleman, has secured remarkable privileges from some legislatures; but it is a speculative and hazardous undertaking, often tainted with fraud, with nothing to recommend it as a method of securing compensation awards, and has been twice doubly damned by competent authorities.[61]

[59] 24 Journal of Pol. Econ., pp. 973–974 (Dec. 1916).

[60] Harwood E. Ryan in The Annals, vol. LXX, p. 251 (March, 1917).

[61] See pamphlet on "Liability and Compensation Insurance on the Reciprocal or Inter-Insurance Plan" by P. T. Sherman; Ryan (supra), p. 252.

Although this chapter has been chiefly devoted to an attempt to establish the superiority of compulsory state-managed insurance over all other methods of securing the compensation award, there is no gainsaying the fact that the adoption of a strict state insurance law in one of our forty-odd commonwealths will be productive of hardships so long as neighboring states refuse to take similar action. The increased cost of doing business which adequate provision for one's employees entails, must be shifted to the consumer; and what guarantee has the employer that his customers will not refuse to pay the advance in price of the commodity which he produces, and buy outside of the state from manufacturers not troubled by rising costs due to superimposed ideals of social justice?[62] The problem is a very real one; but its solution lies not in abandoning progressive legislation, but in securing its uniform enactment, and thus preventing the shirker from profiting by his disregard of the obligations he owes the community.

[62] Gephart, Insurance and the State, pp. 191, 201–202.

CHAPTER VI

HOW IT WORKS IN NEW JERSEY

THE first of our States to have in full operation a permanent workmen's compensation act was New Jersey.[1] Approved on April 4, 1911, this interesting statute went into effect just three months later; so that for nearly seven years, New Jersey has been the chosen field of one of the most important legislative experiments which this country has known. It is due to this fact of the New Jersey statute's being the oldest of its kind in the United States, and hence the one whose merits and demerits have been submitted to the most searching tests of experience, that it has been selected for particular study here; though its own interesting and typical provisions would of themselves entitle it to the distinction of separate treatment.

[1] American Labor Legislation Review, vol. V, p. 34 (March, 1915). See also New Jersey Law Review, vol. I, p. 45 (May, 1915). The compensation law of Kansas was approved March 14, 1911, but was not made effective by its terms until Jan. 1, 1912; while the New Jersey act went into operation on July 4, 1911. The Nevada act, which by its terms was to go into operation July 1, 1911, has been entirely superseded by a statute of 1913. See Bulletin of the U. S. Bureau of Labor Statistics, No. 126, p. 313, and chart, p. 48; Report of Workmen's Compensation Aid Bureau of New Jersey, 1916, p. 9.

The adoption of workmen's compensation by New Jersey followed close on the heels of a legislative attempt to deal with the industrial problem by "an act to extend and regulate the liability of employers for injury or death to employees in certain cases." [2] This statute, passed in 1909, had expressly affirmed the doctrine of assumption of risk, and had made "the exercise of reasonable care at the time" by the employee a condition precedent of recovery. Its sole advance over the common-law lay in the restrictions which it imposed on the operation of the fellow-servant rule. Where injury or death of an employee resulted from defects in machinery or plant due to the negligence of the employer or his servants, or by reason of the negligence of overseers, or of any person in the employer's service entrusted with the control of any signal, switch, locomotive engine, or train upon a railroad—in these few cases the fellow-servant rule was to be relaxed, and its availability as a defense to the employer done away with. There could be no more vivid illustration of the tenacity of the old system than the passage of so conservative a law at so late a date by a state destined to be one of the leaders in the compensation movement.

[2] N. J. Laws 1909, c. 85; cited Pamphlet Laws 1909, p. 114.

In the two following years the first experiments with the new principle were made in the United States. But when the New Jersey legislature of 1911 convened, the only American compensation acts on the statute books were those of New York and Montana, both soon to be declared unconstitutional by the courts.[3] Indeed, before the legislation which we know as the New Jersey Workmen's Compensation Act had become a law, the New York Court of Appeals in the Ives case had found the compensation law of that state invalid as infringing fundamental constitutional guarantees.

Just what influence the Ives case, coming so close before the actual passage of the New Jersey act, had on the drafting of that statute in the peculiar form which was adopted, it is impossible to say; but there is not the slightest doubt that fear of the courts influenced the legislature in its choice of a system at least nominally optional. It was plain that a judiciary, however jealous of constitutional rights, would not have the same reason to take umbrage at an act which provided by its terms that the parties could contract out of it, as at one which left to those affected no choice in the matter. Events

[3] Ives v. South Buffalo Ry. Co. (1911), 201 N. Y. 271, 94 N. E. 431; Cunningham v. Northwestern Improvement Co. (1911), 44 Mont. 180, 119 Pac. 554.

proved that the New Jersey law-makers were correct in this assumption.[4]

The ingenious scheme which was employed to take the New Jersey statute out of the class of compulsory acts, was the framing of alternate sections, under one or the other of which every contract of employment must come. If the parties contract in such a way that Section I may be applicable, the employer's liability is dependent on his negligence. The common-law defenses of "fellow-servant's fault" and "assumption of risk" are abolished, and only willful negligence on the part of the employee operates as a bar to his recovery against a negligent master. Section I, then, leaves the common-law criterion—"whose fault was it?"—in full force and effect. It merely destroys certain artificial outgrowths of the main test, and is strictly an employer's liability as distinguished from a workmen's compensation provision.

But it was clearly not the intention of the framers that any considerable number of contracts of hiring should come under Section I. The inclusion of that section in the act was in the nature of a "sop to Cerberus," being intended rather to soften the

[4] See Sexton v. Newark District Telegraph Co. (1913), 86 Atl. (N. J.) 451.

transition from the old common-law of negligence to the new system that practically disregards fault, than to furnish a permanent method of seeking remedies in accident cases. Section II is the real workmen's compensation act of New Jersey; and the clause of the statute which has made it applicable to almost all employments reads as follows: [5]

"Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to be with reference to the provisions of Section II of this act, and unless there be as part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of Section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of Section II of this act and have agreed to be bound thereby. In the employment of minors, Section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

Experience has shown conclusively that the employers' liability system provided by Section I of the New Jersey statute cannot compete with the workmen's compensation features introduced by

[5] N. J. Laws 1911, c. 95, par. 9; cited Pamphlet Laws 1911, p. 136.

Section II. A vast number of contracts of employment are and always will be entered into by the parties in ignorance of or without special reference to the particular bit of legislation applicable; and to all of these the compensation provisions apply automatically. Only by expressly stipulating that they do not intend to be bound by Section II can parties avoid such a result; and it is quite obvious that employers who will find their common-law rights greatly curtailed in that event are going to be very unwilling to consent to such an arrangement. This factor was judicially recognized in one of the early cases in which the act was construed, the Court saying: [6]

"It is optional with the master and servant whether the employment shall be under Section II of the Act or not. It is a matter of common knowledge that in this regard the person who seeks work is at rather a disadvantage, for unless he is willing to accept employment under Section II of the Act he will have a very small opportunity to obtain any."

But the best proof that Section I has been generally disregarded is the indisputable fact that prac-

[6] Kalisch, J., in Nitram Co. v. Creagh, 86 Atl. (N. J.) 435, at p. 436.

tically no actions have been brought under it. Among the reported cases which have reached the higher courts of the state I was able to find in my early researches only two[7] in which it was attempted to bring the contract of employment under the unpopular section, while upwards of 100 decisions had been handed down by those same courts in suits brought under Section II. And the most reliable statistics show that the proportion of the total number of accidents which were brought under Section I by election of either employer or employee was only 5.8% in 1912, 5.3% in 1913, 4% in 1914, and 2% in 1915.[8]

The State of New Jersey, then, possesses a workmen's compensation act which, though nominally optional, is conceded to be virtually compulsory within its field. In this respect it resembles many of the American statutes; for "presumptions of acceptance" have frequently been resorted to by wily legislators.[9] As a typical enactment, therefore, it

[7] Kennedy v. David Kaufman Sons Co., 91 Atl. (N. J.) 99; Young v. Sterling Leather Works, 96 Atl. (N. J.) 1016. Even in the Kennedy case the action was not brought originally under Section I of the Compensation Act, but under the Death Act of 1848 (*2* Comp. Stat. N. J. 1910, p. 1907).

[8] Reports of Employers' Liability Commission of New Jersey, 1913, 1914, and 1915, at pages 7, 21, and 7, respectively.

[9] For instance, in Alaska, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Nebraska, Nevada, Oregon,

is worthy of careful study. We will examine its main provisions in some detail, and endeavor to ascertain how far those provisions have proven satisfactory in actual operation.

(1) Employments covered. The New Jersey Act is more liberal in this respect than any other American law.[10] All private employments are covered, except casual ones;[11] and, since 1913, all public employments except elective officials or at salaries exceeding $1,200 a year.[12] Farm labor and domestic service, which for one reason or another most legislatures have thought it proper to exclude from the operation of their compensation statutes, are thus subject to compensation in New Jersey. The innovation has not been continued without protest; but bills to exclude domestic service from the act have so far failed of passage.

The importance of having a compensation law extend to the widest possible range of employments cannot well be overestimated. If the principle is sound from an economic and moral point of view

Pennsylvania, Vermont, Wisconsin, and perhaps other states. See texts of statutes.

[10] That is, out of all the American statutes which automatically include employees, without the necessity of any act of election, the most extensive group is so included under the New Jersey law.

[11] P. L. 1911, p. 144, being Section III, par. 23, of the original act, as amended by P. L. 1913, p. 311 (N. J. Laws 1913, c. 174).

[12] P. L. 1913, p. 23 (N. J. Laws 1913, c. 145).

—and the preceding pages have been wasted if they have not demonstrated beyond all cavil that it is—there is no reason, in justice or expediency, for denying its benefits to any wage-earner. The domestic servant is as necessary a cog in our complicated social machinery as the factory-worker; the farmhand performs services very essential to the existence of the community. No employments are unproductive; or if they are, the public which creates them rather than the workman who engages in them is to blame, and should bear the burden of accidents sustained therein.

Though the New Jersey law offends less than any other American statute against the views just expressed, it is nevertheless open to criticism. The exclusion of casual employees from its benefits, though supported by the precedent of the British Act of 1906, is indefensible in principle, and unjust in operation. The pernicious nature of this distinction was illustrated by the well-known case of Joseph C. Gaynor,[13] arising under the Massachusetts Compensation law, where the widow of a waiter who was killed by an accident arising out of and in the course of his employment was de-

[13] Gaynor v. Standard Accident Ins. Co. (1914), 217 Mass. 86, 104 N. E. 339.

nied compensation because her husband had been technically a casual employee, hired by the job, though his employer always engaged his men that way. That this result was unjust, and that Gaynor's widow should have been spared the poverty which doubtless descended upon her, will readily be conceded; but such a situation is not uncommon where the rule as to casual employees is in effect.

It is difficult to understand what reasons, of public policy or otherwise, could have persuaded the New Jersey legislature to create the other two classes of exceptions to the general application of the act—elective officials and public employees at salaries exceeding $1,200 a year. Perhaps it was felt that the commonwealth ought to be spared the additional expense; but, as an able writer has pointed out, public employees should be included in any rational compensation scheme, since the public ought to be a model employer.[14] Nor does the exclusion of officials merely because they receive a salary of a certain size commend itself to the critical mind. Such a man striving to rear and educate a family on $1,200 a year, will suffer just as much

[14] Amer. Econ. Rev., vol. V, p. 240 (June, 1915); Report of Workmen's Compensation Aid Bureau of New Jersey, 1916, p. 12.

and become just as much of a charge on the community as his less highly paid brother. Distinctions based on such arbitrary grounds fail to take into account differences in the standards of living, in social and educational demands, which make the children of the departmental clerk relatively as helpless as the family of the injured mill-hand. Starvation, perhaps, is more imminent in the latter instance, and to that extent the need for compensation is more imperative; but it would be a sadly ragged scheme which stopped at the extreme cases, and gave no relief to meritorious public servants or their dependents simply because the salaries of the injured before injury were sufficiently large to give rise to the presumption that the families were in no danger of immediate relegation to the bread-line.

It is significant that all attempts further to restrict the employments covered by the Act have met with failure. The Employers' Liability Commission, appointed to observe and report on the administration of the law, resolutely set its face against efforts from various quarters to exclude farm laborers and domestic servants in 1912 and again in 1913;[15] basing its opposition to such exclusion on

[15] Reports of New Jersey Employers' Liability Commission for 1913, 1914, and 1915, pages 4, 6, and 3–4, respectively.

both principle and expediency. And, despite recent agitation, it seems unlikely that there will be any narrowing of the statute with respect to employments covered; while the introduction of the compulsory State insurance scheme which the Commission has persistently recommended, and which is inevitable, will in all probability silence the present opposition by reducing the apparent burden on the small employer to the insignificant obligation of the payment of premiums.

(2) Occupational Disease. The time-honored phrase "accident arising out of and in the course of his employment" occurs in the New Jersey law; and in construing it English precedents of interpretation have been closely followed [16]—so closely that a survey of the general subject in this place would be a mere repetition of what has been treated earlier in the present work. The problem of occupational disease, however, is always of vital interest, and the progress along those lines in New Jersey is worthy of special attention.

Mr. Holmwood, in the preface to his handbook

[16] See Hulley v. Moosbrugger, 93 Atl. (N. J.) 79, where plaintiff had been injured as the result of horseplay indulged in by other employees. The State Supreme Court granted compensation; but on appeal this was reversed, the Court of Errors and Appeals quoting English cases to support its position (95 Atl. 1007).

on the New Jersey Act, refers to occupational disease and the questions to which it gives rise as the greatest single problem for the courts to deal with in interpreting the law.[17] But it would be difficult to persuade the man in the street that the question is one properly for the courts at all. It is true that high-minded tribunals, more concerned with practical justice than the natural and accepted meanings of words, have in a few instances classed rare occupational diseases as "accidents," and granted the sufferers compensation on that basis;[18] but to encourage our courts in thus doing violence to common-sense would be folly indeed. New Jersey, which has followed English precedents so much in the construction and interpretation of its compensation law, can well afford to indulge in further imitation by adding to its present act a schedule of occupational diseases for which awards will be made regardless of their accidental origin. In England such a schedule was added to the act of 1906; and from including some six diseases or groups of diseases it has been extended to cover

[17] Holmwood, New Jersey Employers' Liability Law, p. 4.

[18] Brintons v. Turvey, 1905 App. Cases 230 (anthrax); Thompson v. Ashington Coal Co. (1901) 84 L. T. N. S. 412 (blood-poisoning); Kelly v. Auchenlea Coal Co., (1910) S. C. 864 (pneumonia from inhaling gas after explosion).

over twenty-five, on successive recommendations of the Secretary of State.[19]

It is hardly necessary to devote space here to justifying the policy of compensating sufferers from occupational diseases. Death or injury by accident is more spectacular, but it is not more certainly a risk of the employment. As one writer has said: "Every argument which can be brought forward in favor of compensation for industrial accidents, which is now acknowledged to be humane, applies with equal force to compensation for industrial diseases." [20]

The practical problems involved in the administration of a compensation act covering industrial diseases as well as accidents are, however, numerous and confusing. As the present Commissioner of Labor of New Jersey has pointed out, in a very able discussion of the subject, physicians who have been trained to recognize symptoms of diseases peculiar to industrial workers are very rare, and the ascertainment of proper cases for awards would be correspondingly difficult.[21] The question, too, of what diseases should be reached by the

[19] Report of N. J. Employers' Liability Commission, 1914, pp. 12–13.

[20] New Jersey Law Review, vol. I, p. 69 (May, 1915).

[21] Report of N. J. Employers' Liability Commission, 1914, p. 17.

compensation law, is one which will probably have to be settled by a compromise.[22] On principle, every case of a malady traceable directly or indirectly to the employment should be compensated. But, unless we are to follow the Germans in frankly accepting invalidity insurance, such an inclusive program is practically impossible. To ascertain the facts alone in individual cases; to make sure that a cough was contracted in a draughty work-room rather than on a midnight spree; would require incalculable labor and expense, and the results would be doubtfully accurate at best. If we are to confine our awards to cases where the injury, be it accident or disease, can be said to arise "out of and in the course of the employment," the best we can do is to guarantee compensation in the case of diseases like lead-poisoning, for which the employment itself is obviously to blame.

It has been stated on reliable authority that there are in use in the factories of New Jersey nearly fifty industrial poisons capable of producing serious and even fatal disease.[23] In the hatting, pottery and smelting industries of the state in particular there are a great number of cases of

[22] Ibid., p. 19 (Letter from State Comissioner of Labor Lewis T. Bryant to the chairman of the Employers' Liability Commission).

[23] Report of N. J. Employers' Liability Commission, 1914, p. 18.

disability which are due directly to the occupation.[24] Though the New Jersey legislature has passed a number of acts compelling the use of safety and sanitary appliances in factories where these dangers are incurred, none of the diseases themselves have been brought within the purview of the compensation statute. The omission to do so seems hardly defensible in view of the precedent of Great Britain and many of our States, and especially when we take into account the fact that the Employers' Liability Commission appointed to observe the workings of the law has repeatedly recommended the passage of a bill making provision for awards to sufferers from specified industrial diseases.

Though the conscience of the legislature does not appear to have been sufficiently awakened to make it heed the call for action on the question of compensation for industrial disease, a good work was done by the Employers' Liability Commission, working in conjunction with the Commissioner of Labor, in framing a bill which is recommended for passage. This projected bit of legislation has been drawn with a nice eye for the practical matters

[24] New Jersey Law Review, vol. I, p. 68 (May, 1915); American Labor Legislation Review, vol. V, p. 77 (March, 1915).

of administration. "Certifying Physicians," appointed by the State Board of Medical Examiners, are to make the necessary examination of diseased employees, and issue certificates to those entitled to compensation. The maladies to which this proposed act applies are: [25]

1. Anthrax.
2. Lead poisoning or its sequelæ.
3. Mercury poisoning or its sequelæ.
4. Phosphorus poisoning or its sequelæ.
5. Arsenic poisoning or its sequelæ.
6. Poison by nitro- and amido-derivatives of benzine.
7. Poison by carbon bisulphide or its sequelæ.
8. Poison by nitrous fumes or its sequelæ.
9. Chrome ulceration or its sequelæ.
10. Eczematous ulceration of the skin produced by dust or liquids, or ulceration of the mucous membrane of the nose or mouth produced by dust.
11. Compressed air illness or its sequelæ.
12. Telegraphists' cramp.
13. Aniline poisoning.
14. Wood alcohol poisoning.

[25] Report of the N. J. Employers' Liability Commission, 1915, pp. 53–56. The proposed statute is entitled merely "A supplement to" the compensation act of 1911.

While by no means a complete list of the occupational diseases occurring in New Jersey, this table probably comprehends the most prevalent and menacing. It would form a splendid foundation on which, as experience warranted, a more ambitious structure could be erected; and it is to be hoped that the people of New Jersey will soon force their legislators to adopt this excellent scheme which their Commission has devised.

(3) The Schedule of Awards. Only second in importance to the question whether any awards are to be made at all is the amount of such awards. If workmen's compensation is to fulfill its destiny, it must do more than proffer a scanty alms to sufferers from industrial accidents. It must provide for them and their families substantially, save them from the degradation of the poor-house or private charity, and maintain them on a level higher than that of mere animal existence. The unfortunate workman's children must go to school, be properly clothed and fed, be trained for useful citizenship. His wife or widow must be spared the cruel hardships that wither women before their time. Nor is such a law the vision of a sociological Utopia. It is possible as well as desirable; it has worked and is working in practical communities.

In New Jersey an elaborate schedule of compensation awards has been evolved and incorporated into the act and its amendments. To say that it is wholly unsatisfactory is to pass too harsh a criticism on a system which has at least been so far superior to that which preceded it as to have furnished about three and one-half times as much compensation to dependents of injured workmen;[26] but its defects are many and obvious, as we shall proceed to show.

The subject of awards naturally divides itself into three heads: (1) awards in case of death; (2) awards in case of total disability; (3) awards in case of partial disability.[27]

When a workman dies as the result of an injury by an accident received in the course of and arising out of his employment, his family is entitled, under the New Jersey law, to from 30 to 60 per cent. of his wages according to the number of dependents, subject to a maximum of $10 and a minimum of $5 or full wages (if such are under $5) weekly; the same to be paid for a maximum period of 300 weeks. In addition, the employer must defray the expenses of

[26] Bulletin of the U. S. Bureau of Labor Statistics, Whole No. 126, p. 116.

[27] Ibid., p. 36.

last sickness and burial, the latter not to exceed $100.[28]

Where not death but total disability occurs, fifty per cent. of the weekly wages will be paid, with the same maximum and minimum of $10 and $5 or full wages (if such are under $5) respectively; the maximum period is 300 weeks, but in the case of permanent total disability this is raised to 400 weeks.[29]

For partial disability, the awards are of course smaller, being fifty per cent. of the weekly wages for periods varying according to the nature of the injury. The maximum period during which compensation will be paid even for permanent partial disability is 300 weeks; and the maximum and minimum weekly payments are as before—$10 and $5 or full wages (if such are under $5). For loss of certain members a fixed schedule is provided: thus, for loss of an arm, fifty per cent. of wages during 200 weeks; for loss of an eye, fifty per cent. of wages during 100 weeks; etc.[30] Loss of "both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof" is considered as constituting

[28] N. J. Laws 1911, c. 95, pars. 12 and 14(a).
[29] Ibid., pars. 11(a), (b), 14(a).
[30] Ibid., pars. 11(c), 14(a).

total and permanent disability, and is compensated on that basis.[31]

Compensation in no case begins until two weeks after injury, at the end of the so-called "waiting period." In the interval the employer must furnish reasonable medical and surgical aid, unless the employee refuses it, but not to exceed $50 in value. When compensation begins, this obligation ceases.[32]

The foregoing brief summary of the present schedule of compensation awards in New Jersey will be sufficient to enable us to understand the criticisms that have been levelled against it. The American Association for Labor Legislation opened fire on it three years ago in a comprehensive arraignment which uncovered the many weak spots.

At the threshold, the provision for medical attendance has been the target of unfavorable comment. The fact that the employee must accept the physician his employer provides, and that that physician is apt to be prejudiced in favor of the man who pays his fees are minor objections; a much more serious matter is the insufficiency of the provision itself. $50, or two weeks' medical attendance, is often not enough to insure the early re-

[31] Ibid., par. 11(c). [32] Ibid., par. 14.

covery of the injured workman and his return to full earning capacity. This is especially true in the case of infection, which frequently does not become serious until more than two weeks after the original accident; and it is true, too, in the many cases where, after extended treatment, it becomes apparent that an operation alone will reach the root of the trouble.[33] In such instances the burden is put, very unfairly, on the injured workman and his family. That a more liberal provision, such as reasonable medical attendance until convalescence is assured and special attention becomes unnecessary, would not only be productive of greater justice but would appreciably lessen the death and disease resulting from lack of proper care of the injured, cannot be doubted. It is a tacit recognition of this truth that the State Employers' Liability Commission repeatedly recommended, among other proposals for legislation, the passage of a "provision for appeal to Court for additional medical services in exceptional cases." [34]

But far more serious than the problem of providing medical attendance,—which, after all, is

[33] Amer. Labor Legislation Review, vol. V, pp. 64–68 (March, 1915); also New Jersey Law Review, vol. I, pp. 63–64 (May, 1915),

[34] Report of N. J. Employers' Liability Commission, 1914, 1915, pp. 8 and 4, respectively.

substantial, though not always sufficient, under the New Jersey act—are the limitations arbitrarily put on the amounts awarded as compensation to injured employees and their dependents. That the ever-alert Employers' Liability Commission was awake to this defect as early as March 24, 1914, when it gave as its opinion that "the present rates were fixed at too low figures"; [35] and that the Commission has consistently recommended the substitution of 66⅔% of wages as a basis of the schedule instead of 50%, besides a general increase in the schedules themselves; [36] these facts will not avail the State as a defense to the criticisms to which she is subjected for her low schedule of awards, in view of the cool disregard of the Commission's suggestions by the legislature. Content with being a pioneer state in compensation, New Jersey has clung to the statistical basis adopted in the frankly experimental days, and still deserves the sneer of the famous expert who calls the minimum weekly payment in force in New Jersey and other commonwealths "rather a sorry comment upon the social conscience of States proud of their culture." [37]

In truth, the limitations with which the scale of

[35] Report for 1913, p. 3.
[36] Report for 1914, pp. 7–8; Report for 1915, p. 4.
[37] Rubinow, Social Insurance, p. 192.

compensation under the New Jersey Act has been hedged about, and which have made it one of the lowest in the country,[38] are not of the sort to earn for the legislators who designed them a high place among constructive statesmen. Take, for example, the death benefits, which vary from 35% of wages for one person dependent to 60% for six or more, for a maximum period of 300 weeks. In case of the death of a laborer earning $12 a week, with a widow and six dependent minor children, for instance, the award would be $7.20 a week. Such families on such wages as $12 are not at all uncommon; but they live always on the margin, and a sudden reduction in family income like the foregoing would spell misery if not starvation. The inadequacy of death benefits is constantly being recognized by the courts in granting applications to have the awards commuted to a lump sum, enabling the survivors at least for a time to keep the wolf from the door.[39]

Compensation for total disability is subject, as we have shown, to a weekly maximum of $10 and a minimum of $5. That it is often impossible for a family to sustain life on the meager allowance

[38] Amer. Labor Legislation Review, vol. V, p. 64 (March, 1915).
[39] Ibid., p. 74.

under this law, to say nothing of enjoying reasonable comforts, has been proved by the investigations of the American Association for Labor Legislation. Frank M. earned $12 a week; the compensation to which he was entitled after his injury, $6, was not enough even to pay for rent and food for his family of four.[40] John B. was totally disabled for five months; the $6 a week awarded to him under the act was not quite enough to pay for rent, food, and a fifty-cent insurance premium, and left no margin at all for fuel, light, clothing, and other necessaries for himself and his wife. Cases might be multiplied; but anyone with ordinary experience in purchasing will understand at once that to expect a family to live on such a pittance as is provided by the "advanced" New Jersey act is preposterous.

While in the case of death and total disability the extent of the misfortune makes it exceedingly difficult to arrive at a fair estimate of the compensation to be granted, the same obstacles do not confront us in the case of injuries resulting in partial disability only. The normal basis of compensation in such cases is the estimated loss of earning power.[41] Yet this has been so far disregarded in New Jersey that a schedule of awards granting so much for loss of

[40] Ibid., p. 69.

[41] Ibid., p. 73.

an eye, so much for amputation of a leg, wholly without reference to the effect on earning power, has been adopted; a system which has been said to have no merit save that of originality.[42] A moment's reflection on the absurdity of granting the same compensation for loss of an index finger to a compositor and a ditch-digger, the latter of whom may suffer no loss of wage, while the former may be compelled to seek employment at a greatly reduced remuneration,[43] will reveal the fundamental inequity of the system.

Our stock of grievances against the New Jersey schedules is not yet exhausted. The limited time during which payments are made, especially in the case of so-called permanent partial disability, is lamentable in view of the permanence of the impairment of earning power. Dr. Rubinow has treated this subject with biting sarcasm in his work on "Social Insurance." Commenting on the action of the United States Employers' Liability and Workmen's Compensation Commission in embodying the feature of the New Jersey law under discussion in its bill for compensation of employees in interstate commerce, he remarks:[44]

[42] Rubinow, Social Insurance, p. 194.
[43] See footnote 39.
[44] Rubinow, Social Insurance, p. 195.

"The Commission says: 'In dealing with this class of injuries the law should be so framed as to say to the injured man, "True, you have lost an arm, and for a considerable period of time (!) it will be difficult for you to engage in the labor to which you have been accustomed, or to acquire the ability to do other work; but one-armed men are not necessarily drones, and it is your duty to become a self-supporting member of society as soon as you can do so. In the meantime you are to be taken care of."' It is difficult to characterize this sort of argument when addressed to a manual laborer. Need the honorable Commission be told that a one-armed man can never engage in the labor he has been accustomed to, and that while one-armed men are not necessarily drones, they are never able (as wage-workers) to earn anything like the amount they had been earning as able-bodied men, and surely not to support a family?"

Not long ago I was discussing the New Jersey compensation act with a mechanic employed in the Edison Phonograph Works. "I couldn't possibly live on the money I'd get under the compensation act," he said, "even though I have no family except my wife to support. I make thirty to forty-five dollars a week; if I were laid up, I would only get

ten, and probably most of that would go to the doctors. But it's the men with big families that get hit hardest."

"What percentage of a man's wages do you think he ought to get in case he is laid up?" I asked him.

"Seventy-five per cent.," he answered promptly. "And that means seventy-five per cent. of what he's earning, with no ten-dollar maximum."

Not unnaturally, this workingman set a higher standard of payments than has found favor with most legislative bodies, who are perpetually compromising between the divergent demands of capital and labor. But it is significant that he did not suggest full pay, for which he would have had the precedent of the old Federal compensation act of 1908. Perhaps he intuitively knew that such a system was demoralizing and tended to encourage malingering, which became a serious problem under the Federal act.[45] But the temptation to malinger is not apt to be very strong when the sick benefits are substantially less than wages; and so a seventy-five per cent. basis would avoid this pitfall and yet furnish compensation at least roughly adequate in the average case.

[45] Bulletin of U. S. Bureau of Labor Statistics, Whole No. 155, p. 80; also Journal of Political Economy, vol. XXIII, p. 809 (October, 1915).

It is obvious, however, that a system as inelastic as that suggested by my chance acquaintance is far from the ideal. The number of dependents is taken into account in the apportionment of death benefits under the compensation act even now; why, may we ask, is this important matter wholly overlooked when the employee is rendered helpless instead of being killed? Because he has a right to remain single and be the sole consumer of his wages, says the individualist. But that is not the point. Industrial accidents create social problems; and it is the purpose of a rational compensation act to deal with such in proportion to their gravity. The injured workman with the six dependents presents a serious problem; the bachelor's case is not so alarming. The matter may be very simply stated; in one case there are seven mouths to feed, in the other only one. To make the same provision for both workmen in amiable disregard of this obvious distinction, is to be guilty of unutterable stupidity.

It is not my purpose to frame an amendment to the New Jersey law prescribing a new and adjusted scale of compensation. That is a matter for experienced actuaries to handle; the criticism indulged in here has been simply destructive, in the sense that it has sought to demolish the artificial and hap-

hazard system which was adopted by the legislature at a time when American experience was wanting, and which has threatened to become traditional. I have merely sought to indicate some of the things which must be taken into consideration in constructing a proper schedule of compensation—the possibility of living on the awards made; the number of dependents of the recipient; the large proportion of all awards which must be exhausted under the present system in defraying the expenses of medical attention alone; etc. Perhaps already a prophet has arisen in Israel who will harmonize these and many jarring elements into an epoch-making system; who will achieve that rare blend of practicability and justice which the legislative idealist always seeks but never finds.[46]

(4) Insurance Features. Until the year 1917, New Jersey had no provision for insurance of compensation awards. In this respect, as in so many others, it followed British precedent, and with unfortunate results. Suppose such a case as this, for example: A workman in a small tailoring es-

[46] Some idea of the scientific research which German and Russian compensation experts have engaged in, in the effort to formulate proper schedules of awards, may be gained by reading the section on "Amount of Compensation" on pp. 36–47 of Bulletin of U. S. Bureau of Labor Statistics, Whole No. 126.

tablishment is injured, and awarded compensation for 100 weeks. A month or two later his employer fails. Until the recent insurance amendments, the unfortunate laborer had no redress. His rights were merely personal ones against his employer, and if the latter was unable to meet his obligations, the injured man was the loser. There was no law compelling the employer to insure, nor to provide any security for the sudden demand that might at any time be made on him by the death or serious injury of a workman. A small employer might easily be ruined by being forced suddenly to pay compensation to a number of claimants after a disaster like a fire, the explosion of a boiler, or some similar accident. It is true that a sagacious man would provide against such calamities by insuring his workmen; but men love to take a chance, and so long as there is no compulsion exerted hundreds of employers will continue the penny-wise, pound-foolish policy of saving on premiums and trusting to Providence that no accidents will occur. If such employers alone were to suffer thereby, the community might well afford to leave them to their own folly; but unfortunately it is the injured workmen who bear the brunt of such mistakes on the part of their superiors.

If the financial collapse of industrial establishments were a rare occurrence, the problem presented by the original New Jersey law to which I have referred, would not have loomed large among compensation questions. But the complete shipwreck of even large industrial enterprises is a happening which is too common to excite even passing interest. In 1912 sixty-six manufacturing establishments in New Jersey closed permanently.[47] The mortality among small employers, particularly retail dealers with two or three employees, is tremendous, as anyone familiar with bankruptcy court practice will testify. In some lines of business, as the building trades, the workmen are largely employed through sub-contractors, whose financial irresponsibility makes it exceedingly difficult to collect compensation when legally due.[48] If we add to this that even in cases where an employer voluntarily insured his employees, the latter had no legal claim to the insurance money, which went to receivers for the benefit of general creditors, in the event of the employer's bankruptcy, we will have no difficulty in understanding why, in 1915, compensation which was legally due was not paid in

[47] Bureau of Statistics of New Jersey, 36th Annual Report, pp. 258–259.

[48] Amer. Labor Legislation Review, vol. V, p. 63 (March, 1915).

199 cases of non-fatal accidents, or 3.1% of the total; and in 21 cases, or 12.4% of the total of fatal accidents.[49]

The class of claimants which suffered most under the New Jersey act from the absence of insurance features in the law was, of course, that which is composed of injured workmen or their dependents to whom awards had been made of payments continuing for an extended period. These individuals, it may be noted, are those who in general feel the greatest need of compensation; among them are those maimed for life, the minor children of deceased laborers, and destitute widows. Under the system of weekly payments, compensation may be spread over a period of six or seven years. During such a period, an industrial establishment might suffer many reverses of fortune; it might fail and leave the claimant stranded, with but a fraction of the legal compensation paid. The injustice of such a situation is too obvious for comment.[50]

The final adoption in New Jersey in 1917 of a system under which insurance or some other security for awards is required of employers, was far from a revolutionary move. On the contrary, that

[49] Report of N. J. Employers' Liability Commission, 1915, pp. 7–8.

[50] See ibid., pp. 32–40 inclusive, in which the Commission strongly recommended compulsory State Insurance.

action had the sanction of most of the precedent in the United States. Of the thirty-eight states and three territories having workmen's compensation acts in force at the present writing, nearly three-fourths require insurance or proof of financial responsibility on the part of employers coming under the act by choice or otherwise; and in most of the exceptional states the principle of insurance is recognized to the extent of prescribing regulations for the conduct of such insurance as employers may voluntarily assume. Only in Alaska and Arizona to-day have the legislatures been so blind to the practical aspects of the compensation question as to make no provision at all for securing awards.[50a]

(5) Administration by the Courts. What were the motives which led the legislature that passed the act of 1911 to leave the administration of the statute to the courts? Conservatism, perhaps, which trusts the courts above all other human agencies; possibly economy, for the creation of a special machinery to enforce the act would unquestionably have been expensive; or it may have been that a Senate and

[50a] In both of those places, an employer may under certain circumstances file security and stay judgment; but this is of course not "securing compensation" in the sense of the text, as it is done *after* the injury. Alaska Laws 1915, c. 71, secs. 10–13; Ariz. Laws 1912 (codified by Senate Bill No. 70, Extra Session 1913), sec. 3173.

Assembly composed so largely of lawyers regarded with an unfriendly eye any scheme which would turn over to administrative commissions or officers cases which have long been regarded as the legitimate spoil of the legal profession. Whatever the influences which swayed the law-makers, however, the legislation of 1911 is not in harmony with present tendencies. In more than two-thirds of the compensation states, including most of those whose acts have been passed in the last two or three years, some administrative body—an Industrial Accident Board, State Insurance Commission, or other committee of officials—has the lion's share of the active authority.[51]

Radical changes in the administrative machinery of the New Jersey compensation law were introduced by the legislature of 1918. To the new scheme we shall presently have reference; but as this chapter is primarily a review of New Jersey *experience,* the merits and demerits of the system hitherto in force will first be discussed. Merely to say that the New Jersey practice did not conform with the usage of other states does not, to my mind, condemn it. The popular tendency is sometimes the wrong tendency. It will be worth our while

[51]Report of N. J. Employers' Liability Commission, 1914, p. 42.

to weigh the advantages and demerits of the method of court administration, as presented by the respective champions of the court and commission systems, before passing judgment.

When a workman was injured in New Jersey by an accident arising out of and in the course of his employment, there was first an attempt at an amicable settlement. In the vast majority of cases this was successful; for the schedule of awards had at least the merit of being definite, and the extent of the liability of the employer was generally obvious. In cases of dispute, the matter was referred to the Court of Common Pleas of the county in which the accident occurred; the Judge heard the testimony and decided in a summary manner on the law and the facts. An appeal to a higher tribunal could be taken for errors of law only.[52] The prescribed compensation according to the schedules of the act had to be paid if the employer was found liable at all; agreements between employer and employee for irregular compensation were unenforceable,[53] and a Judge who awarded more or less than the statute allowed was acting in excess of his powers.[54] Common Pleas Judges were authorized to

[52] N. J. Laws 1911, c. 95, pars. 18, 19, 20.

[53] Ibid., par. 20.

[54] Ibid. See also Report of N. J. Employers' Liability Commis-

commute awards to lump payments when such action seemed advisable.[55]

Such was the system of "court administration" in force in New Jersey until the amendments of the current year. What it really was is this: a system of voluntary adjustments, with the courts as a last resort in cases of dispute. Cases found their way to the Common Pleas either (1) because of non-agreement; (2) because of non-payment; (3) upon a petition for commutation of a claim to a lump sum. It has been estimated that more than half of them were brought in for the last-named purpose.[56] So when we find that out of the total number of compensation cases only 6.8% found their way to the courts in 1913, 6.6% in 1914, and 5.5% in 1915,[57] one of the common criticisms of the New Jersey act—that it encouraged litigation, the very thing a compensation act should be framed to avoid—seemed hardly warranted by the facts.

The most comprehensive indictment of the court method is that framed by the American Association for Labor Legislation in its report of Three Years

sion, 1915, p. 10, where this comment is made on a case: "Court refused compensation, doing something strictly forbidden."

[55] N. J. Laws 1911, c. 95, par. 21.

[56] Amer. Labor Legislation Review, vol. V, p. 40 (March, 1915).

[57] Report of N. J. Employers' Liability Commission, 1913, 1914, 1915, pp. 9, 31, and 27, respectively.

under the New Jersey Workmen's Compensation Law, published in March, 1915. The very figures I have just quoted are cited by the ingenious compilers to show, not that peaceful and equitable settlements are the rule, but that workmen whose claims have been improperly adjusted kept away from the courts because of delay and expense, fear of and unfamiliarity with their procedure, and the advantage which the wealthy employer had in those tribunals. "As a result," it is said, "there was no supervising authority to see that the vast majority of claims were properly adjusted"—a conclusion which is undeniable, but which did not entail such hardship on the injured employee as is implied; for he could always go into court and recover the balance due him, and often did so, as some of the very cases cited by the Association show.[58]

The opponents of the court method have grouped their objections to the system under three heads: (1) The delay of court procedure; (2) The cost of court procedure; (3) The unfitness of courts for the settlement of compensation claims.[59] As statistics and instances have in each case been brought forth in support of the contentions, the whole con-

[58] Amer. Labor Legislation Review, vol. V. pp. 58–61 (March, 1915).

[59] Ibid., p. 40.

stitutes an interesting critique of the act of 1911 which is worthy of discussion here.

The most important of the three alleged defects appears to be that of delay. In most cases, as we have seen, awards have been made amicably by the employer on determining the nature and extent of the injury; but there were enough instances in which no voluntary settlement could be reached to keep the courts busy. An examination by one investigator of 72 cases of fatal injuries taken to the courts during the year 1913 showed that the average time elapsing between the date of the accident and the date of the award was twenty-seven and a half weeks, while in only five cases had anything been paid the petitioner before the award was made.[60] Among 232 non-fatal cases during 1914, the average time elapsing between accident and award was thirty-seven weeks and one day. The period of delay was often so long that benefits were not paid until the injured workman had recovered and returned to work; for example, of 53 awards for temporary total disability made by the courts during 1913, fifteen were for disabilities which had already ceased.[61]

It is evident that this constituted a very real prob-

[60] Ibid., p. 41.

[61] Ibid., p. 43.

lem. Relief delayed is often no relief at all; and where the injured laborer is living on the margin, the long delays which a disputed award entails may plunge him deep into debt or bring him to actual starvation. There is little doubt that administration by a commission with summary powers, which was earnestly advocated by the minority of the Employers' Liability Commission, in one of its reports,[62] makes for improvement in this respect. Whether the resulting decisions in contested cases are as just and able or not is a question on which the respective champions of court and commission methods differ.

In almost all cases of disputed awards under the act of 1911, the claimant was represented in court by a lawyer.[63] This has been criticized as entailing a large expenditure on the petitioning workman, and lessening the compensation recovered by a disproportionately large amount. Yet the law made every effort to protect the employee by making the attorney's fees subject to the approval of the court;[64] and, though in exceptional cases a ridicu-

[62] Report of N. J. Employers' Liability Commission, 1914, p. 48 (minority report of John T. Cosgrove and S. Botterill, the two members of the Commission representing Labor).

[63] Amer. Labor Legislation Review, vol. V, p. 44 (March, 1915).

[64] N. J. Laws 1911, c. 95, par. 21.

lously large proportion of the award was eaten up in lawyers' charges, in one case 38%,[65] in the vast majority of instances this item was not a large one, the average, according to the figures of 1915, being roughly 5.7% of the total compensation awarded.[66] Perhaps the worst thing that can be said of the cost of litigation is that it tends to keep small claims from the courts, for a lawyer cannot afford to give his time for the three or four days which may be required to fight a case when the fee will be $10 or less. And, since the ordinary workman has no money, his case must ordinarily be taken on a contingent basis, so that his chances of getting first-class counsel are small compared with the employers, who are prepared to pay the fees in any event.

The so-called "unfitness of the courts for the settlement of compensation claims" has been made much of by certain critics. A joint committee of the National Civic Federation and the American Federation of Labor, which visited the various states having compensation acts in operation in 1913 and published its report as a United States Senate document,[67] calls attention to the fact so often commented on by the Employers' Liability

[65] Amer. Labor Legislation Review, vol. V, p. 45 (March, 1915).
[66] Report of N. J. Employers' Liability Commission, 1915, p. 28.
[67] No. 419, 63d Congress, 2d Session.

Commission of the large number of cases not reported in New Jersey, and says: "From information received by this Commission, it seems probable that not over 60 per cent. of the amounts payable under the New Jersey statute are being paid. The opportunity for fraud exists, fraud that is difficult to detect. This condition could not exist in a State having an industrial accident board with power to approve all settlements and follow up the payments and see that they are made in full." The conclusion of the American Association is similar: "Observation of the settlement of claims through the court seems to show that their very nature tends to make them unfit for the settlement of compensation cases." [68] The two labor members of the New Jersey Employers' Liability Commission, in their minority report submitted in 1914, take the same view: "We are convinced as a result of close observation and long and careful consideration of the subject that it is a mistake to place the administration of a workmen's compensation law in the hands of the courts. We are of the opinion that administration through a commission of three paid members, with summary powers, would prove to be more satisfactory because more efficient, and that such

[68] Amer. Labor Legislation Review, vol. V, p. 47 (March, 1915).

administration would be most truly economical in the long run." [69]

The specific objections urged to show the unfitness of the courts for compensation settlements are in some cases worthy of careful consideration. For instance, it is said that judges have usually little knowledge of industrial processes and neither time nor opportunity to become specialists in compensation law. The answer that would probably be given to this is that where compensation cases occupy an important place in the daily business of a common pleas judge, he has every incentive to familiarize himself with all the aspects of the problem. If such a functionary had only occasionally to do with this branch of law, the objection would be serious; but the reports for 1915 showed cases in all but one of the 21 common pleas courts in the state, and in Essex and Hudson, the two most populous counties, over sixty cases apiece.[70] In actual practice, though, the courts do not seem to have justified this ideal of self-education; and the American Association for Labor Legislation presents an appalling array of mistakes due to misinterpretation of the law and direct transgression

[69] Report of N. J. Employers' Liability Commission, 1914, p. 41.
[70] Report of N. J. Employers' Liability Commission, 1915, p. 27.

of it. Through the vigorous intermediation of the Employers' Liability Commission and the wisdom that comes only with experience, these mistakes have been vastly reduced; so that, while 207 cases of irregular or faulty compensation were reported for 1913, and 169 in 1914, there were in 1915 only 27 such irregularities [71]—a very small number. It is doubtful if even a paid and expert Commission could greatly improve on the record of this latter year, especially when it is considered that the 27 irregularities were some of them of a trifling nature; but judges shift with politics, and it is certainly safer in the long run to have trained and tried men in permanent command of this phase of compensation administration than to leave all to the chance of having judicial incumbents of the requisite experience and temperament.

An objection to the court method of administration which cannot fail to strike anyone who is familiar with the operation of compensation and liability laws is the fear which the employee often feels that a court appeal will cost him his employment. Though often unfounded, this fear is undoubtedly inspired in many instances by employers or their representatives, and cases are on record in which dis-

[71] Ibid., p. 7.

charge has actually followed on an injured workman's attempt to obtain compensation legally due him.[72] This feature, deplorable in the cynical comment on human nature which it constitutes, is not, however, a weakness peculiar to court-administered acts, but is equally present in all compensation and liability laws which provide for direct collection of benefits from the employer. Whether court, commission, board, or single official is to hear the case and decide the question of the employer's liability and its extent, unscrupulous employers will always be eager to prevent the issues from ever being presented for determination, and will use that silent influence which the lord of labor always has over those dependent on his favor for their jobs, to keep the workingman from his due. There is only one effective way of destroying this practice utterly, and that is by forcing the employer to insure, so that when compensation is to be paid it does not come directly out of his pocket, but affects him so remotely that the motive for impeding the course of justice is gone.

That the multiplicity of tribunals in New Jersey in which workmen's compensation cases might be tried, and may still be tried on appeal under

[72] Amer. Labor Legislation Review, vol. V, p. 56 (March, 1915).

the amendment of 1918, tends to create confusion through conflict of judicial decision, is undoubtedly true. There are twenty-one common pleas courts in New Jersey, one for each county; and unless and until points of interpretation of the act receive authoritative attention from the higher tribunals of the State, the decisions of each court are binding precedents in the local forum. The construction of the clause stating that "every contract of hiring made subsequent to the time provided for the act to take effect" is presumed to come under the act, is a shining example of the conflict of judicial decisions resulting from the system. Some courts held that the law applied only in case the contract of hiring was entered into in the state; others were equally emphatic that the place where the work was done, and not where the employment contract was made, was the determining question.[73]

The court method has its defenders. For the most part these are conservatives who resent the increasing intrusion of administrative commissions into the field of judicial activity. Thus, no less an authority than Mr. Bradbury has characterized the system as "entirely adequate," and goes on to say: "So far as the disclosures made up to the

[73] Ibid., pp. 52–53.

present time are concerned, the evil which is to be met, does not seem to justify the elaborate and expensive system which has been established in New York to meet it. As employees become more and more familiar with the law, cases of inadequate payment will be found very rare, under the rule in New Jersey where any agreement can be examined and set aside on the ground merely that the payments are not as great as the statute required." [74]

A very recent amendment to the New Jersey compensation act—Chapter 149 of the Laws of 1918—creates a Workmen's Compensation Bureau. At first sight this new body seems to be a counterpart of the administrative commissions at work in so many states; but an examination of the statute shows that the curious reluctance of the New Jersey legislature to abandon the court system has manifested itself in an awkward compromise. Judges of the Common Pleas may still take testimony and decide cases, though only after the Bureau has failed to satisfy the parties. The details of this remarkable scheme will be discussed at the close of this chapter under the heading "The New Administrative Machinery"; but before pass-

[74] Bradbury, Workmen's Compensation and State Insurance Law (2d Ed.), p. 794.

ing to this topic it will be instructive to study two earlier creations of the legislature—the Employers' Liability Commission and the Workmen's Compensation Aid Bureau.

(6) The "Commission" and the "Bureau." Though, as we have shown, no official machinery for taking the administration of the compensation act out of the hands of the courts was attempted to be created in New Jersey prior to 1918, and the executive work devolved upon the judicial tribunals already established for other purposes, two auxiliary bodies were created at different times by statute to render a sort of unofficial assistance to the ministers of justice. The first of these was the Employers' Liability Commission, to whose activities we have already had occasion to refer; and the second, which took the place of the Commission, was the Workmen's Compensation Aid Bureau.

The Employers' Liability Commission, to be composed of "six citizens, at least two of whom shall be representatives of organized labor," appointed by the Governor and serving without pay, was created in 1911,[75] the year of the passage of the compensation act itself. Its duties were at first vaguely defined, being "to observe in detail, so far

[75] N. J. Laws 1911, c. 241.

as possible, the operations throughout the State" of the Workmen's Compensation law. The results of this observation, together with any suggestions or recommendations which the Commission might make, were to be embodied in an annual report. A subsequent statute, passed in 1912, requiring employers, insurance companies, etc., to make reports of industrial accidents to the Commissioner of Labor, provided that the Commission should have free access to these reports, and relieved it of the obligation of duplicating them; and an amending act was also passed in 1913.

The actual work of the Employers' Liability Commission cannot be spoken of too highly. Its reports, published annually up to 1916, contained the careful statistical compilations to which every student of the New Jersey compensation act must turn for information. Many a case which threatened to develop into a long struggle in the courts, with expense to both employer and employed, was settled amicably through the intervention of the Commission. Irregular cases were made to conform with the law through correspondence; thus, the report for 1915 contains a list of 57 such irregularities which were adjusted through the beneficent action of the Commission,

and 13 cases in which it tried and failed.[76] Besides this eminently practical field work, the members took a very active interest in the drafting of legislation to remedy some of the defects in the present law which we have pointed out; and in this the Commission as a whole, and the two labor members in particular, showed themselves progressive and sanely constructive. Among the laws recommended in the last report and submitted to the legislature for consideration were: an act creating a Workmen's Compensation Aid Bureau in the Department of Labor (which was passed with slight changes by the legislature of 1916); a compulsory insurance act, creating also a State Insurance Fund; an act revising the schedule of awards on a 66⅔% basis, and providing for more thorough medical attention; and an act including specified occupational diseases among the disabilities for which compensation is payable.[77] The minority of the Commission, being the two labor members, also expressed themselves in favor of administration by a paid Commission of three members with summary powers.[78]

By legislation of 1916 the mantle of Elijah was

[76] Report of N. J. Employers' Liability Commission, 1915, pp. 20–23.

[77] Ibid., pp. 28–31, 32–40, 42–52, 53–56 inclusive.

[78] Report of N. J. Employers' Liability Commission, 1914, p. 48.

made to descend on new shoulders. Though not expressly repealing the act creating the Employers' Liability Commission, the statute which called into being the Workmen's Compensation Aid Bureau [79] made that intent so clear in its delegation of the Commission's powers to the new body, and its proviso that inconsistent laws are "hereby repealed," that the extinction of the predecessor may be deemed accomplished. The purposes for which the Bureau was organized were briefly stated in a letter to the author from Mr. W. E. Stubbs, who acted as its secretary, as he had of the Commission which preceded it. He wrote: [80]

"The main object of this Bureau is to review all settlements as reported by employers or insurance carriers, and to furnish an approval to both employer and employee, if the settlement is found to be entirely in harmony with the Statute, and failing to accomplish this, the Bureau is authorized to certify a state of facts to the Court of Common Pleas, which Court will assign counsel to represent the injured person, and in the event of an award in favor of the employee, this counsel's fee may be charged against the employer, who is without legiti-

[79] N. J. Laws 1916, c. 54.
[80] Letter dated Trenton, N. J., July 26, 1916.

mate excuse for delay, or failure to pay adequate compensation. It is our hope, through these activities, to bring about a satisfactory administration of the compensation law in this State."

Elsewhere in this letter Mr. Stubbs described the make-up of the Bureau: "The Workmen's Compensation Aid Bureau, in addition to the Hon. Lewis T. Bryant, Commissioner of Labor, as its head, is composed of Mr. W. E. Stubbs, Secretary, and Messrs. Geo. J. Jaeger and Harry J. Goas, as referees, appointed for the purpose of visiting various cities on stated days, in order to render aid wherever same may be of service, by giving advice to employers and employees, or in assisting insurance companies in adjusting matters with injured persons. Anyone desiring information can secure same from the representatives without charge."

After the letter from which I have just quoted was written, the Bureau published its report for the year 1916. In a later communication to me, Mr. Stubbs, the Secretary, said he found it "necessary to explain that owing to meagre appropriations on the part of the Legislature, I have never been able to carry a force sufficient to enable me to do many things which are accomplished by Bureaus in other states. One of these is the pub-

lishing of decisions of the courts, and other matters pertaining to our work, which would be of interest to the general public. The only thing which has been issued is the annual report for the year 1916." [81]

The apology seemed hardly needed. The Workmen's Compensation Aid Bureau was created by act of March 15, 1916; the task of organizing, adopting methods, designing of blanks, forms, etc., and enlightening employers and the general public as to the purpose and powers of the Bureau, had then to be accomplished before effective routine work could be begun. The excellent results attained during the brief remainder of the year were a credit to the members of the Bureau, and quite overshadow the doubtful disadvantage which the public sustains through the absence of the voluminous reports of cases and other literature which state commissions take such universal delight in producing.

The legislative recommendations of the Bureau, like those of its predecessor, the Employers' Liability Commission, were of a progressive sort. As a study of the Act, and the making of suggestions for its improvement, were among the duties with which

[81] Letter dated Trenton, N. J., September 5, 1917.

the Bureau was specifically charged by the statute creating it, these recommendations are especially significant. Among them are: a reduction of the waiting period to one week; the inclusion within the provisions of the Act of state, county, municipal and other public employees receiving salaries in excess of $1,200 a year; the increase of compensation rates to sixty-six and two-thirds per cent. of wages, and of the minimum and maximum weekly payments to $6 and $12; the investing of authority to make actual awards in controversies in the Bureau's referees; compulsory insurance or security of payments (now happily secured by the amendment of 1917); and many minor alterations.[82]

The Bureau took up the work of reviewing both fatal and non-fatal cases where the Employers' Liability Commission laid it down; and the year 1916 shows a substantial increase in the number of successful adjustments made. A corresponding decrease in the number of petitions to the courts is observable, and is highly creditable to the Bureau, which during its brief existence made every effort to combat the vicious effects of litigation of compensation claims.[83]

[82] Report of Workmen's Compensation Aid Bureau, 1916, pp. 6–12.
[83] Ibid., p. 18.

The work of the referees was perhaps potentially the most important of all. During the four months of July to October, 1916, 1049 individuals appeared before Messrs. Jaeger and Goas, information and advice were given in 262 cases, 118 cases were settled, and 132 hearings granted.[84] The referees were handicapped by lack of power to make awards and commutations, the method of certifying disputed cases to the Court of Common Pleas resulting in delays and dissatisfaction. Another need very strongly felt was that of the services of a special physician for the Bureau, to assist the referees in cases of dispute as to the permanence of injuries, the extent of particular disabilities, etc. Despite imperfections in the administrative machinery, however, the work of imparting information, harmonizing conflicting interests, hastening the slow course of justice, and saving attorneys' fees and court expenses for both parties to controversies, went on very satisfactorily under the Bureau's direction.

(7) The New Administrative Machinery. We have seen that the comparative merits of the court and commission systems have been the subject of heated controversy for some years. It might have

[84] Ibid., pp. 19–20.

been supposed, therefore, that one scheme or the other would presently triumph, and be adopted unreservedly by the legislature. Instead, the New Jersey Assembly of 1918 has seen fit to enact into law an awkward compromise that can hardly be satisfactory to either faction, and preserves the faults of both rival systems so meticulously that it holds a unique place among legislative acts.

This 1918 provision, which is in the form of an amendment to the original law of 1911, purports to turn over to a Workmen's Compensation Bureau that exclusive original jurisdiction over compensation claims which was exercised by the Courts of Common Pleas. This provision, however, is practically nullified by a further clause permitting either party, if dissatisfied with the findings of the Bureau, to appeal the judgment to that very Court of Common Pleas which is elsewhere deprived of original jurisdiction; trial on appeal—and this is the astounding part—to be *de novo,* with the same right to produce and examine witnesses and present other testimony that existed at the original hearing.

The new law is big with possibilities of discord and confusion. An employer unsuccessful before the Bureau will be tempted to appeal, and by some new twist of the evidence, in which he will have the

advantage because of his ability to secure the services of expensive counsel, throw his opponent out of court. On the other hand, because of the power of the court to tax costs and attorneys' fees on the unsuccessful party, the injured employee will ordinarily be afraid to appeal. Discrepancies will arise between the evidence before the Bureau and the evidence in the new trial, and time will be wasted haggling over them. Since the compensation cases before the Judges of Common Pleas will be relatively fewer, the danger of having men charged with the administration of compensation claims who are unacquainted with industrial conditions and even with the branch of law to which the controversies belong, will be greatly increased.

What the New Jersey legislature has actually done has been, not to turn over the effective administration of the compensation law to a specially appointed commission, but to give some color of legal sanction to what is essentially a system of voluntary settlements—merely to extend, in short, the sphere of influence formerly possessed by the Workmen's Compensation Aid Bureau. That body was empowered to pass upon the validity of agreements for compensation entered into between the parties, and to initiate proceedings where the

injured employee or his dependents neglected to do so; and all that is added in the creation of the new Bureau is the power to go through the form of a trial and make a finding which the parties are at liberty to disregard. It is true that the statute speaks of vesting in the Bureau jurisdiction formerly possessed by the Courts of Common Pleas, and denominates the action of a party in refusing to concur in that body's conclusions and demanding a judicial hearing an "appeal." Looking through the form to the substance, however, it will be seen that the original jurisdiction of the courts of law is left intact; and the only substantial change from preëxisting methods is that there is thrown upon the state authorities, in every instance where a party chooses to make trouble, the unnecessary burden of a second investigation into the facts.

The details of the new scheme are not of especial interest, and will be disposed of briefly. The membership of the Bureau includes the Commissioner of Labor, three deputy commissioners, and such referees or other employees as may, in the judgment of the Commissioner, be necessary. (Sec. 1.) Its "exclusive original jurisdiction," so-called, is to be exercised by these officials "sitting individually or together." (Sec. 3.) An agree-

ment between the injured employee and his employer for compensation may be filed, within twenty-one days after the accident, with the Bureau, and if approved by it becomes binding on the parties; where there is a failure to file or secure approval of such an agreement, the Bureau is to endeavor to bring about a settlement of the claim, filing a petition on its own initiative, with the consent of the injured workman or his dependents, where he or they have neglected so to do. (Sec. 4.) In this latter case, or in the case of the petition being filed by the proper party within one year from (1) the date of the accident, or (2) failure of the employer to pay according to the terms of an agreement, or (3) last payment (where one or more payments have been made), a time is to be fixed for hearing before the Commissioner of Labor, a deputy, or referee, within a stated period after service of the petition upon the employer and the Secretary of the Bureau, the place of hearing to be either in the county where the injury occurred, or where the petitioner resides, or in which the defendant was served with process, or where defendant's place of business is located. (Sec. 5–7.)

The proceedings in a case before the Bureau are

of a summary nature. Both parties may produce evidence exclusive of *ex parte* affidavits; but the official conducting the hearing is not to be bound by the rules of evidence. (Sec. 9.) The Bureau has the power to modify awards or permit commutation thereof. (Sec. 10.) Subpoenas, witness fees, the allowance of costs, taking of depositions of absent witnesses, and other legal formalities are provided for. (Secs. 8–18.) From the Bureau's decision, however, the "appeal" to the Court of Common Pleas, already described, may always be taken, and an entire new trial had. (Sec. 19.) The Act creating the Workmen's Compensation Aid Bureau is repealed. (Sec. 22.)

If the 1918 Amendment were itself amended so as to do away with the provision for a trial *de novo* by the Court of Common Pleas, and permit appeals to the proper tribunals on questions of law only, it would commend itself to those who have made the most careful study of compensation experience, and be in harmony with the best tendencies of the day. That part of the Act which bestows judicial powers upon the Bureau is in itself good; and it is only insofar as the statute is emasculated by the provisions permitting nullification of the Bureau's de-

cision and a wasteful re-threshing of the whole case by a law court, that it deserves crushing criticism.

. . . . . .

The author's views, as well as the facts, with regard to all the important outstanding features of the New Jersey Workmen's Compensation Act have been set forth at some length in the foregoing pages.[85] The minor problems, and some of those common to American compensation legislation—such as the "waiting period," extra-territorial effect, etc.—have been given more general treatment elsewhere.

[85] For a recent, though not altogether satisfactory review of the New Jersey compensation law, see the short article by Walter M. Adriance in The American Economic Review, vol. VII, pp. 712–713 (September, 1917).

CHAPTER VII

THE ATTITUDE OF LABOR

The proponents of social legislation in this country are becoming increasingly aware of the influence exerted on theories and measures, not by workingmen, individually or collectively, but by "organized labor" so-called. Whereas it has become almost a political axiom that the labor vote elects no presidents, and may be counted on in the long run to follow party lines with the same faithfulness and apparently for the same reasons as the other sections of the population, leaders of the unions and federations and brotherhoods into which the toilers have organized themselves speak with no uncertain voice in the nation's councils. Where the interests of labor are involved, however remotely, they are championed with varying degrees of success but with quite consistent aggressiveness.

The social utility of this marked partizanship of labor organizations is questionable. Class hatreds are stimulated, and the efficient conduct of state

business may be very seriously hampered, by such a policy as that adopted by the California State Federation of Labor, which distributes a "Labor Record" of Senators and Assemblymen, tabulating their attitude on important labor measures on the basis of "Good Votes" and "Bad Votes." The inherent iniquity of this species of lobbying is the more apparent in the case of the California report when we see that bills to abolish capital punishment, to lengthen the terms of judges, and to license detective agencies, are considered important "labor measures" on which trade unions should stand and fall together.[1]

But whatever our opinions as to the methods which organized labor employs to enforce its demands, the power of the American Federation and its branches is undeniable, and makes the question of its exercise in the great field of workmen's compensation one of supreme importance. In ascertaining the sentiments of trade unions on various aspects of compensation legislation, I have had recourse to two principal sources of information. One of these sources has been periodical literature,

[1] See report on Labor Legislation and Labor Record of Senators and Assemblymen (Forty-first Session of California Legislature, Jan. 4 to Jan. 30, and Mar. 8 to May 9, 1915)—San Francisco: Cal. State Federation of Labor.

especially labor publications, and speeches and articles by labor leaders; the other has been my correspondence with labor leaders throughout the country, to whom I have written for expressions of opinion on sundry topics connected with the subject at hand.

Criticism and comment by organized labor on workmen's compensation legislation have naturally been directed toward those features most closely affecting the practical interests of the workingman. The employments covered, the accidents covered, the rates of compensation, the "waiting period," provisions for medical attention,—these matters have interested labor more than complicated insurance problems and theoretical questions which are fundamental but not immediate. I am able to present here a symposium of views which appear to be representative. But first it will be well to consider labor's views on the basic principles.

On the general proposition of the desirability of workmen's compensation in some form there is substantial accord. As a prominent labor leader said in the hearing before the Employers' Liability and Workmen's Compensation Commission at Washington in 1911, "practically all labor unions of working people are wedded to the theory of workmen's

compensation." [2] But on many details of the legislation in our states no sort of unanimity has been attained.

The plan, beloved of Socialists, of incorporating workmen's compensation into a larger social insurance scheme, has been a special center of attack, being looked on by many labor leaders as an evasion of the real issue of the laborer's inherent interest in the profits of his toil, as well as a dangerous sign of a governmental paternalism ready to crush out the individual freedom of the workingman. A contributor to the American Federationist writes:

"Benevolent society does not go to bed-rock questions—why the meager wages, starved lives and the restricted opportunities of those who toil with their hands. It offers palliatives, not remedies. This new form of charity provides for the division of society into classes based on wages received. Those who receive less than a specified sum, automatically come under government supervision on the theory that they are unable to care for themselves and their dependents properly. Therefore, the state and their employers set aside money for their upkeep in times of emergency. The work-

[2] Senate Document No. 338, 62d Congress, 2d Session, at p. 551; Statement of W. S. Carter, President Brotherhood of Locomotive Firemen and Engineers.

ers themselves make but meager contributions. Thus the fundamental principle of social insurance is to make permanent distinctions between social groups and to emphasize that distinction by governmental regulation. What wage-earners want is not benevolently administered saving of pennies but opportunity to do the world's work like free men and women and to receive honest returns for their labor in the form of adequate wages. Get off the backs of the workers and there will be no need for 'insurance,' for then wage-earners like employers will have enough to live on and to provide for emergencies without 'aid.' " [3]

It is submitted that in his enthusiasm for the general cause of advancement of the workingman, the writer just quoted has suffered a temporary hiatus of common sense. There is no reason in the world why social insurance should be incompatible with high wages. There is every reason in the world why, even with the highest wages likely to be attained short of the millennium, compulsory insurance should be imposed on employers or employees or both. Saving cannot take the place of insurance; both because saving cannot, and in many in-

[3] Grant Hamilton in American Federationist, vol. XXIV, pp. 124–125 (February, 1917).

stances should not, be forced upon the recipient of a mere living wage, and because the young man at the outset of his career, to take one example, must face the danger of disabling accident without accumulated earnings. There is a need for social insurance not distinct from, but wholly incorporate with, the need for a fairer division of profits with the men whose toil, equally with the genius that directs it, makes production possible. Higher wages, by raising the standard of living from subnormal to normal, will help to stamp out disease and the accidents traceable to poverty and its incidents —ignorance and insufficient equipment; compulsory social insurance will take care of the diminished margin of misery, and rescue the stricken and those dependent on them from economic shipwreck.

It is quite immaterial in this connection how much the workingmen themselves contribute to the insurance fund, or whether they contribute at all; a natural economic adjustment would take place in either instance, so that wages would be greater or less by the amount of the premiums, depending on whether or not the laborer was called on to pay them. Collecting from the employer is collecting at the source—a mere matter of convenience. Whether the state should contribute to social insur-

ance funds is a more puzzling question. If the theory of industrial hazard is sound, it would seem not; the funds should be self-supporting, and contributions thereto drawn solely from the industry directly affected, and not indirectly by taxation from the people as a whole.

The innate conservatism of man, be he capitalist or mechanic, has served, however, to raise quite a formidable opposition to the extension of the compulsory social insurance principle. No less a leader than Mr. Samuel Gompers has declared emphatically: "Our movement stands for social insurance and government aid, but of a voluntary character and not compulsory."[4] It is usual to cite the success of social insurance schemes carried on by the trade unions themselves as an argument against entrusting their administration to the government; and to prate of the danger to "fundamental principles of human liberty" resulting from the adoption of the compulsory principle.[5] The real reason why certain powerful forces in the American Federation of Labor have continuously opposed centralized social insurance is not far to

[4] Samuel Gompers in American Federationist, vol. XXIII, p. 676 (August, 1916).

[5] Ibid., pp. 348, 674 (May and August, 1916); see also Hamilton article (supra, footnote 3), pp. 124–125.

seek; its adoption would tend to weaken the labor unions, depriving them of one of the means whereby they endeavor to make themselves indispensable to the workingman. Organized labor is jealous of its power; it regards itself as the instrumentality dedicated to the task of wresting from capitalistic oppressors the share in the profits of production to which the toiler deems himself entitled. Consequently, organized labor does not relish the idea of a workman turning to another agency —the government—for aid in his affliction; the right of the laborer to fight his battles for economic recognition through his own trade unions being thereby infringed.

The author confesses to a complete lack of sympathy with this point of view. He believes that provision for the compensation of both sick and injured laborers is a matter of too great public concern to be left in the hands of irresponsible voluntary organizations. The purpose of social insurance as applied to workmen's compensation is to abolish the indigent class created by industrial accidents. To accomplish this, governmental compulsion is needed; it will not do to leave the workman the option of insuring, for that would mean that in many instances the gambling spirit would assert it-

self, and insurance would be neglected on the chance that no accident would occur. Moreover, if the old liability system were retained, the workman would often be too poor to insure himself adequately, since the employer, being subject to expensive damage suits for injuries to his employees, would be compelled to hold in reserve to meet those emergencies a sum which ought to be expended in increasing wages, or insuring reasonable compensation. Under an adequate workmen's compensation system, where awards are properly secured—and that can mean only some sort of state insurance—the employee has no need to insure himself against accidents, as payment in the case of injury is guaranteed him. Hence, where workmen's compensation is adopted, the question left is not one affecting the independence of the employee at all, but simply the relative efficiency of pure compensation and insured awards, the liability of the employer being fixed in either case.

Bitter as is the present-day opposition from some quarters to applying social insurance principles even to the comparatively narrow field of workmen's compensation laws, it is encouraging to note that one form of unprogressive criticism is slowly dying out. In the earlier days of the movement, the pop-

ularity of "elective" acts which left it optional with both parties to labor contracts whether the provisions of the "experimental" new legislation should apply, was one of the striking manifestations of the eagerness of organized labor to retain its independence from governmental "paternalism." As recently as 1914 the Convention of Railroad Conductors "was not opposed to compensation if it could be made optional, and favors improving and strengthening liability laws." [6] But this feeling has largely given way to an eager desire for, and a general acquiescence in, compulsory compensation—as distinguished from compulsory social insurance—by the labor interests. The joint Commission of the American Federation of Labor and the National Civic Federation, reporting in 1914, summed up the situation as follows:

"The Commission found that as employees became accustomed to the working of compensation acts and realized that they were real and substantial and that payments were made promptly, they lost interest in the question of employers' liability laws, *they generally expressed themselves as satisfied with a good compensation act and did not care for the*

[6] In Report of Proceedings of 24th Annual Convention, 1914, American Federation of Labor.

option to sue under the liability law. While this was not always the case, it is rapidly becoming the dominating thought. In fact, the evolution of this legislation tends toward making the compensation act an exclusive remedy." [7]

To the attitude of labor towards the more specific questions raised by workmen's compensation—injuries covered, employments covered, methods of administration, amount of compensation, etc.—recommendations of the Executive Committee of the American Federation of Labor furnish the best key. Supplementing this and similar data by frequent reference to my letter-file, I am enabled to present the following outline of labor opinion on the subject at hand as I have found it.

Basis of Computing Compensation Rates. Early compensation laws, like that in force to-day in New Jersey, unquestionably erred on the side of parsimony in their schedules of awards. The basis of computation was commonly 50 per cent.; thus, if a workman were totally disabled for a period of four months, he would receive by way of compensation a sum equal to only one-half of his wages during that period, and even that was likely to be curtailed by some absurd provision, as that

[7] U. S. Senate Document 419, 63d Congress, 2d Session.

not more than $10 a week should be paid to any victim. The obvious inadequacy of such payments naturally attracted the attention of those directing the movements of organized labor; and the legislatures were very shortly under fire from labor lobbyists, who demanded a more liberal basis of compensation. The American Federation puts first on its list of injunctions to agitators for compensation reforms: "Endeavor to bring the basis of compensation rates to a minimum of 66⅔% of the wages of the insured." [8]

It has been my experience that this proposal of the Federation meets with general approval among workingmen, though I have talked with some who argued that 75% was a more equitable proportion. A correspondent from the Massachusetts State Branch of the American Federation of Labor writes:

"In Massachusetts the rate of compensation is two-thirds wages and appears at present to be satisfactory. The maximum of $10.00, however, is considered too low and attempts have been made to increase it to $14.00." [9]

[8] Report of Proceedings of 25th Annual Convention, 1915, American Federation of Labor, at page 96.

[9] Letter from H. Sterling, Mass. Branch Amer. Fed. of Labor, Dec. 2, 1916. See also leaflet: "Labor Legislative Measure for 1917," published by the Massachusetts organization.

From Maryland comes the following forceful statement:

"The schedule of award should increase; fifty per cent. is not enough. Personally my idea would be to eliminate the waiting period, increase the compensation to 66⅔% with a minimum of five dollars and a maximum of fifteen dollars. The compensation to be awarded from the first day and to be paid without the necessity of going through a lot of red tape to get it." [10]

The Secretary-Treasurer of the Kentucky State Federation of Labor shares the same views:

"66⅔% is, I believe, a fair schedule of benefits for injury with a maximum weekly payment of not more than $15.00, and in case of total disability, to continue during lifetime." [11]

In the report of the Conference of the Pennsylvania Federation of Labor for 1916, appears this significant item:

"Motion by Fowler that an endeavor be made to have the percentage of compensation raised to sixty-six and two-thirds per cent. Carried." [12]

[10] Letter from Henry J. Hardy, Cor. and Rec. Sec'y., Maryland State and Dist. of Columbia Fed. of Labor, Aug. 17, 1916.

[11] Letter from P. J. Campbell, Sec'y.-Treas., Ky. State Fed. of Labor, Aug. 16, 1916.

[12] See Report Pa. Fed. of Labor Conference, Mar. 1916, at page 6.

"Efforts will be made at the next session of the legislature to amend the law so as to provide for an increase in the compensation to 66⅔% of the wage received at the time of injury," writes a Kansas Labor official.[13]

In New Jersey similar views are expressed.[14] From Porto Rico comes a demand for a 75% basis [15]—but insistence on so high a percentage I have found very unusual.[15a] A North Dakota correspondent even expresses himself as satisfied with 60%.[16]

[13] Letter from Chas. Hamlin, Sec'y.-Treas., Kan. State Fed. of Labor, Aug. 26, 1916.

[14] Letter from H. T. Hilfers, Sec'y., Essex Trades Council (N. J.), Aug. 25, 1916.

[15] Letter from Rafael Alonzo, Gen. Sec'y., Federación Libre de los Trabajadores de Puerto Rico, Sept. 23, 1916. The English of the writer is curious: "A man disabled or despoiled of his means to earn his life should receive highest percentage of the wages that he was able to earn in his normal state to work. A 75 % is a fair percentage."

[15a] The author, in the course of an interview with Frank Morrison, Secretary of the American Federation of Labor, on May 3, 1918, asked Mr. Morrison what wage percentage basis for compensation awards the Federation stood for. "We stand for all we can get," he replied; but, on being pressed, he admitted that 100% would probably be inadvisable, as encouraging malingering. Mr. Morrison's attitude, if really portrayed by his hasty remark, is extreme and exceptional.

[16] Letter from A. W. Bowman, Fargo Trades and Labor Assembly (No. Dak.), Sept. 21, 1916. Mr. Bowman's answer to my question as to rates: "I think 60% would be fair," may be coupled with his answer to another question as to how active labor organizations in North Dakota had been in compensation matters: "Two years ago

To conclude, labor appears content that compensation awards shall be computed on a basis of two-thirds of normal wages; and in the present writer's opinion, that percentage, which has already been adopted in several states, is an eminently fair and practical one. Less would cause suffering; more would encourage malingering.

The "Waiting Period." It was feared by the framers of the early compensation acts in this country that an immediate payment of compensation from the date of injury would result in a multitude of trivial claims; and it was also felt that a certain period of time should be allowed to elapse between the accident and any disbursement, in order to determine the extent of the injury and the facts on which the employee's claim was predicated. Consequently the "waiting period" was devised, during which no compensation is payable, and varying under the American acts anywhere from three days to three weeks in length, though a two weeks' period has been adopted in most jurisdictions.

Needless to say, this feature has been a target for attack by the labor unions. They have pointed out that there is no logical reason for an arbitrary

we got the compensation through the Senate, but it was killed in the House," to indicate that his estimate was based on conjecture rather than experience.

deprivation of compensation during a part of the period of disability; and they have enlarged also upon the hardship caused to very poor families whose income is suddenly cut off at a time when it is particularly needed. There is much justice in these criticisms.

It is worthy of note, however, that labor unions are not unanimous in their demands for the abolition of the waiting period, though there is general agreement that it should be as short as is compatible with its purposes. Where medical attention is to be given at the employer's expense for a limited period, it seems to be the view of labor leaders that a change should be effected, making such attention co-extensive with the suffering.

I subjoin a representative collection of opinions on the waiting period, indicating in each case the state in which the particular labor leader is active:

Oklahoma: "The waiting period should at least be shortened, if not abolished, and the medical period lengthened." [17]

Montana: "The waiting period is not satisfactory but I would not say without further expressions of opinions from those concerned in this move-

[17] Letter from Ollie S. Wilson, Sec'y.-Treas., Okla. State Fed. of Labor, October 18, 1916.

ment whether it should be abolished entirely or not." [18]

New York: "Chief defects of the law are long waiting periods and permitting old-line companies to participate in business." [19]

New Jersey: "I am in favor that *(sic)* the waiting period should be abolished, and the worker should get compensation providing that he is sick a week or more." [20]

Kansas: "A shorter waiting period." [21]

California: "The waiting period should be reduced from two weeks to one week." [22]

Iowa: "I beg to advise you that the present objections to the Iowa law is *(sic)* the time limit in which the injured employee is attended by the physician. Also the waiting period of two weeks and the amount of the compensation." [23]

Pennsylvania: "Motion that the time to begin paying compensation be one day instead of fourteen

[18] Letter from O. M. Partelow, Sec'y., Silver Bow Trades and Labor Council (Montana), Oct. 17, 1916.

[19] Letter from E. A. Bates, Sec'y.-Treas., N. Y. State Fed. of Labor, Aug. 31, 1916.

[20] See footnote 14.

[21] See footnote 13.

[22] Letter from Paul Scharrenberg, Sec'y.-Treas., Cal. State Fed. of Labor, Aug. 25, 1916.

[23] Letter from J. A. Canfield, Sec'y.-Treas., Iowa State Fed. of Labor, Aug. 21, 1916.

days after accident. Amendment that the payments begin from the time of the accident. Amendment carried. Motion as amended carried." [24]

Kentucky: "There should be no waiting period, payment should begin at once." [25]

Maryland: "Personally my idea would be to eliminate the waiting period." [26]

Massachusetts: "Our waiting period was reduced last year from fourteen days to ten days, and seems to be satisfactory except that we desire that when disability continues twenty-eight days, compensation should begin from date of accident." [27]

Arizona: "The injured man should be paid for the time that he loses from the time that he is off duty on account of his injury, instead of losing the first two weeks of his time." [28]

Minnesota: "Our recent convention also went on record for—reducing the waiting period to seven days." [29]

Employments Covered by Acts. As a question

[24] Seefootnote 12

[25] See footnote 11.

[26] See footnote 10.

[27] See footnote 9.

[28] Letter from Thos. A. French, Sec'y.-Treas., Arizona State Fed. of Labor, Aug. 15, 1916.

[29] Letter from George W. Lawson, Sec'y., Minn. State Fed. of Labor, Aug. 25, 1916.

of pure theory, the logical necessity of the inclusion of all employments under an equitable workmen's compensation law is not even debatable. The early acts were confined in their operation to "hazardous employments"; but all employments involve some hazard, and it is only fair that there should be protection in proportion to the danger. At one time it was suspected that the inclusion of all employments within the purview of workmen's compensation acts would be opposed by organized labor on selfish grounds; but that that suspicion was unfounded, and that the labor unions are in substantial accord in their demand for laws of the broadest application, is clear from the following quotations:

Arkansas: "It seems to me that casual employees should not be excluded from the benefits of a compensation act." [30]

Maryland: "The law should be extended to cover all classes of employment and not merely the hazardous class to the wife and children of the dependent." [31]

California: "I do believe that the compensation should be made compulsory for all employments." [32]

[30] Letter from L. H. Moore, Sec'y.-Treas., Ark. State Fed, of Labor, Sept. 14, 1916.

[31] See footnote 10.

[32] See footnote 22.

North Dakota: "I would favor all employments under this law." [33]

Montana: "As to the chief defects of the existing law, they are too numerous to mention. . . . It does not cover aliens. It is not compulsory upon all." [34]

One discordant note, however, comes from a labor leader in Oklahoma: "Would suggest . . . changes . . . for instance, excluding the employer with only two employees, the adding and making clear further industries. . . ." [35] It is submitted that excepting small employers from the operation of the acts in accordance with this suggestion would serve no useful purpose, and is contrary to the spirit of workmen's compensation as well as the current of intelligent labor opinion.

The question of what employments should be covered by the compensation acts has not been discussed to any considerable extent in recent conventions of the American Federation of Labor. The liberal temper of that organization, however, so far as this subject is concerned, is indicated by the support given to the movement (now happily successful) to assure the extension of compensation pro-

[33] See footnote 16.
[34] See footnote 18.
[35] See footnote 17.

visions to workers engaged in loading vessels and services of a similar nature.[35a]

Occupational Diseases. Although certain occupational diseases have been included among the "accidents" for which compensation is due in England for many years, and their number is constantly being added to,[36] the compensation laws of the United States have been slow to recognize the indisputable fact that the acquiring of certain diseases is as truly due to occupational hazard as the blowing off of a workman's arm by an explosion in a dynamite factory. Lead poisoning, for example, in the paint industry, is a danger to which the laborer is constantly exposed, and for which the industry should be made to pay.[37]

Recently the American Federation of Labor has turned its attention to the question of occupational disease. To the list of the recommendations of the Committee on Education on Workmen's Compensation, the following has been added, and strongly

[35a] Amer. Fed. of Labor, Proceedings, 37th Annual Convention, 1917, pp. 116, 311, 312.

[36] The English Act (6 Edw. VII, c. 58), s. 8, subd. 6, also Schedule 3. The schedule enumerates compensable occupational diseases; the other provision permits additions to this list by the Secretary of State.

[37] Honnold, Workmen's Compensation, p. 542. See Adams v. Acme Works, 182 Mich. 157.

urged upon the labor unions engaged in securing legislative reforms: "Compensation to be paid for death or illness from occupational diseases." [38] At the Pennsylvania Federation of Labor Conference, March 22, 1916, a "motion to include occupational disease in the Compensation Act amendment" was carried.[39]

With the qualifications, therefore, already shown to be attached to labor's support of social insurance, the attitude of labor on the inclusion of occupational diseases among compensable injuries can be said to be distinctly favorable.

Methods of Administration. A law which is not enforced is worse than no law at all, for it holds the whole administration of justice up to ridicule, and invites attacks upon the social system at other points. It is all-important, therefore, that the administration of so far-reaching a measure as a workmen's compensation act should be placed in the hands of officials trained for the work, conscientious and reliable in the highest degree, and properly responsible for their actions. Is it better to leave the administration of the law to an insurance commission appointed by the Governor? to an elected

[38] Amer. Fed. of Labor, Proceedings, 25th Annual Convention, 1915, p. 96.

[39] Report of Proceedings, p. 7.

board? to a legislative commission? or to the courts? The question has been variously answered by the state legislatures. With the merits of the controversy we are not here concerned; but the following expressions of opinion by labor leaders may prove of interest:

Florida: "I think if a compensation law was left up to a commission to administer, that the commission should be composed of the most learned men possible, and that the commission should be composed of men from all walks of life, who are well-trained, or who have had much experience in dealing in justice. I think it would probably be best to have men educated for this particular work." [40]

California: "I think the California law is fairly efficiently administered." [41] (An Industrial Accident Commission is in control under the California Act.)

Kentucky: Administration "by special commission" is favored by an official of the Federation of Labor of this State.[42]

Georgia: "This is another question that should be decided by conditions. In states with small pop-

[40] Letter from L. R. Campbell, Fla. State Fed. of Labor, Aug. 14, 1916.

[41] See footnote 22.

[42] See footnote 11.

ulations and having no large industrial centers I think the courts could handle the matter in a very satisfactory manner. In other states, I am of the opinion the courts are so crowded with work now it would be impossible for them to undertake it and a special commission would prove more satisfactory." [43]

New York: "We consider the act has been fairly and efficiently administered." [44] (The New York compensation law is under the superintendence of an Industrial Commission.)

Iowa: "The law in this state has worked out fairly well, considering the short time it has been in operation." [45] (Supervision by the Industrial Commission is the order of things in Iowa.)

Oklahoma: "The method of administering is all right, to my mind, but the law of course restricts the industrial commission and from that they are unable to depart, hence the necessity for amendment." [46]

Arizona: "The principal objection to the present law is the fact that there seems to be no way to force the employer to pay without going into court,

[43] This very sensible and thoughtful answer is from Robt. Fechner, Secretary of the Ga. State Fed. of Labor, under date of Aug. 30, 1916.

[44] See footnote 19.

[45] See footnote 23.

[46] See footnote 17.

and the injured worker, in most cases, has no money to go into court." [47]

North Dakota: "I would favor commission." [48]

The American Federation of Labor itself has set the seal of its official approval on commission administration, having adopted this resolution at its convention in 1915:

"Administration of compensation laws in future to be under the supervision of state commissions appointed for that duty alone." [49]

The relegating of compensation business to the courts is thus becoming more and more unpopular. It can be stated with confidence that organized labor is in full sympathy with the recognized tendency to place the administration of these laws in the hands of appointed commissions, with broad discretionary powers.

. . . . . .

Labor sentiment is shifting and uncertain, but may fairly be counted on to follow the present advantage of the workingman, as he himself sees it. Thus his interest in and his ardor for compensation reforms vary with the immediateness of the problems they are intended to solve. In this chapter

[47] See footnote 28.
[48] See footnote 16.
[49] See footnote 38.

the author has simply sought to picture the attitude of labor at the present day, as to a few of the well-recognized issues which confront all students of the subject. It may well be that a few months from now the attention of trade-union leaders will be quite otherwise focussed, and their views on the very groundwork of the compensation principle have undergone radical changes.

CHAPTER VIII

THE SOLDIERS' AND SAILORS' INSURANCE ACT

With the entrance of the United States into the Great War, the American nation suddenly found itself face to face with a prospect of probable deaths and disabling injuries among its citizens within a brief period, upon a scale hitherto undreamed-of. The closest parallel is the Civil War; but the serious nature of that conflict was not suspected at the outset, whereas in the Armageddon of to-day the strength and resources of the enemy are known to be enormous, and his determination great. Fully aware of the facts, therefore, the Administration, shortly after the declaration of war in April, 1917, set itself with commendable energy to the task of devising means to prevent at least some of the anticipated disastrous social consequences of the cataclysm; and the Soldiers' and Sailors' Insurance Act of October 6, 1917, is the result.[1]

The social problem presented by war risks is the same as that growing out of industrial hazards; but

[1] Public, No. 90, 65th Congress (approved Oct. 6, 1917).

the appeal to a nation's sense of justice is more dramatic in the former case. This accounts, in large part, for the universal acquiescence in the policy of compensating and insuring our fighting men; an acquiescence unique in the history of compensation legislation. Even the private insurance companies have for the most part left off grumbling at the interference of the government in the insurance business, and have coöperated heartily in the administration of the new law.[2]

No nation of modern times has ever taken lightly the duty it owes to the soldiers who fought to preserve it, and to their widows and other dependents. The common method of discharging this obligation, however, has been by a system little differentiated from poor-relief—the system of pensions. Crippled or aged warriors, the families of men killed in battle, and sometimes even able-bodied young men who emerge from the service quite as competent to earn their living as before, have been the recipients of a somewhat hectic bounty. On the other hand, deserving claimants have often been overlooked. The pension system reached its climax of absurdity and inequity in the United States in the period fol-

[2] See Weekly Underwriter, vol. XCVIII, no. 2, p. 34 (Jan. 12, 1918). The article, however, criticises some features of the act.

lowing the Civil War, when pensions became the tool of political aspirants, were used to buy votes, to curry favor with patriotic constituents, and to support distant relatives of long-dead veterans whose claims upon the public gratitude were of the slightest.

The pension scandals were the inevitable result of a disorganized and haphazard method of administering aid to those deemed to have deserved well of their country. No one, we suppose, will dissent from the proposition that where a man has incurred disability while fighting to protect his fellow-citizens, those fellow-citizens should see to it that his enforced non-productiveness does not result in any more misery to him than can possibly be avoided. Common justice and national egoism alike dictate a liberal policy of compensating the crippled hero, and of showing such signal gratitude for his services as to encourage others to serve as faithfully. It does not follow, however, that money bestowed indiscriminately in sporadic bursts of enthusiasm effectively accomplishes these desired ends. As in the administration of all compensation schemes, two things are essential to success: first, that the amounts paid be proportionate to the disability, and to the number of dependents deprived of support;

and, secondly, that the element of charity or gratuity be dissociated from the whole scheme, so that a self-respecting man can accept the money as his just due, as the liquidation of society's obligation to him.

These fundamental principles have been fully recognized in the compensation provisions of the Act of October 6, 1917, and in the sections covering allotments and allowances to dependents. Furthermore, the Act introduces a scheme for voluntary insurance which should have a great effect in reducing the poverty caused by the death or disability of men who are actually or potentially the supporters of families; and vocational training and rehabilitation of crippled soldiers are not overlooked. These and other features will be briefly outlined here.

The Soldiers' and Sailors' Insurance Act (as we have termed it) is in the form of an amendment to the statute of September 2, 1914, creating the War Risk Insurance Bureau. It establishes a Division of Military and Naval Insurance in that Bureau, and charges it with the administration of all the provisions with which we are here concerned. The whole is organized under the Treasury Department; and the scheme itself is said to have been the outcome of coöperation between the Treasury, the Committee on Labor of the Advisory Commission

of the Council of National Defense, the Departments of Commerce, Navy and Labor, an advisory committee of insurance representatives, and others.[3] Insofar as the voluntary insurance provisions are concerned, the moving cause may be said to have been the prohibitive rates charged by the insurance companies to men entering the active military or naval branches.[4]

The first important subdivision of the comprehensive scheme of the Act is the plan of family allotments and allowances. The United States does not intend that men in the military or naval service shall leave their wives and children to shift for themselves; nor does it propose that the amount of money received by the dependents of an enlisted man shall be limited by what he can spare from his soldier's pay, in cases where such provision would be grossly inadequate. Accordingly, it is provided: first, that a soldier or sailor with a wife or children must make an allotment to them of a fixed proportion of his pay; and secondly, that the Government will add to this an allowance graded according to the number of dependents. Furthermore, where the enlisted man voluntarily allots part of his stipend to a pa-

[3] American Economic Review, vol. VII, p. 196 (March, 1918).
[4] Ibid.

rent, grandparent, brother or sister, the Government will, under certain restrictions, supplement such payment by a generous family allowance.

Compulsory allotments to wife or children are in no case to be less than fifteen dollars, nor more than half pay; but with these restrictions they are always to be in an amount equal to the family allowances provided for. The latter, in "Class A" or the compulsory class, are as follows: if there be a wife but no child, $15; if there be a wife and one child, $25; if there be a wife and two children, $32.50, with $5 per month for each additional child; if there be no wife, but one child, $5; if there be no wife, but two children, $12.50; if there be no wife, but three children, $20; if there be no wife, but four children, $30, with $5 per month for each additional child. Family allowances are in no case to exceed $50 per month; and are to be paid by the United States upon written application to the Bureau by the enlisted man or by or on behalf of a prospective beneficiary.[5]

The status of a divorced wife is interesting in this connection. If she has not remarried, and alimony has been decreed her, she has all the rights of a lawful spouse so far as allotments and allow-

[5] Sections 201, 204 and 205 of the Act.

ances are concerned, except that payments must not exceed the amount decreed her as alimony or support, and if her former husband has a second wife or children she is only entitled to the difference between allotments or allowances made to them and half-pay or $50, respectively. The rule as to illegitimate children contains a similar limitation: allotments and allowances are not to exceed the amount the father is bound to pay under the judicial decree.[6]

To the rule that, in "Class A" cases, the enlisted man is compelled to allot the stated proportion of his stipend, there are certain exceptions. Where a wife or former wife divorced consents to a waiver of payments, and there is evidence satisfactory to the Bureau of her ability to support herself and the children in her custody, the allotment may be dispensed with. In the absence of consent by the wife, moreover, exemption may be granted for good cause shown, upon conditions prescribed by such regulations as may be made.[7] Here, as in many places throughout the Act, broad discretionary powers will be seen to be lodged in the Bureau.[8]

[6] Secs. 201 and 205 of the Act.

[7] Sec. 201 of the Act.

[8] This feature is commented on by W. F. Gephart in Amer. Economic Review, vol. VII, p. 197 (March, 1918).

Voluntary allotments the enlisted man is privileged to make to any beneficiary out of any portion of his pay remaining after the compulsory allotment is deducted, but this power is subject to such conditions and limitations as may be imposed by the Secretaries of War and of the Navy, respectively.[9] Where such allotments are actually made by the enlisted man to persons wholly or partly dependent on him, and conform in amount to certain stated regulations, the United States will add to them family allowances according to the following schedule: for one parent, $10; for two parents, $20; for each grandchild, brother, sister, and additional parent, $5. This schedule is the same when the person paying the allotment is a woman in the military or naval service, as, for instance, a member of the Army or Navy Nurse Corps; and in such case there is also a schedule of family allowances for children: for one child, $5; for two children, $12.50; $20 for three; and $30 for four, with $5 per month additional for each additional child. All this group of schedules constitutes "Class B" of the family allowances.[10]

As has been stated, allowances in Class B are conditional upon the enlisted man's making volun-

[9] Sec. 202 of the Act.

[10] Secs. 204 and 206 of the Act.

tary allotments according to certain regulations (though for good cause shown, and under such rules as may be prescribed, exemption from these allotments as a condition precedent to payment of allowances may be granted).[11] The regulations are: that the maximum monthly allotment so required shall be half-pay; that the minimum, where no allotments are made to members of Class A, shall be $15 per month; that the minimum, where an allotment to a member of Class A is being made, shall be one-seventh of pay, but not less than $5 per month. The total monthly allowance paid to members of Class B, added to the enlisted man's allotment, is not to exceed the amount habitually contributed by him to their monthly support during the period of dependency but not more than a year immediately preceding his enlistment or the enactment of the Act. Where an allowance is paid to members of Class A, those in Class B can not receive more than the difference between that sum and $50. As between the two classes, allotments and family allowances are to be apportioned as prescribed by regulations.[12]

A rather radical, but probably wise provision, is

[11] Sec. 206 of the Act.

[12] Secs. 206, 207 and 208 of the Act.

made for those cases where allotments up to one-half of the enlisted man's pay have not been made. The Secretaries of War and of the Navy, respectively, are empowered to require, under such regulations as they may make, that any proportion of such one-half pay as is not allotted shall be deposited to the credit of the enlisted man, at 4 per cent interest, compounded semi-annually, and be held during such period of his service as may be prescribed. When payable the money is to be turned over to him if living, and in case of his death to such beneficiaries as he may have designated, or otherwise according to the laws of intestacy.[13] The purpose of this section is obviously to encourage thrift among the soldiers and sailors. It is an heroic method to apply, as it seems to be depriving the enlisted man of the free use of the money he has rightly earned, but it would doubtless be justified by its social results. Like the provisions for compensation and insurance which we shall presently discuss, this scheme is calculated to reduce that poverty and distress among soldiers and their families which has been in the past one of the most terrible consequences of war.[14]

[13] Sec. 203 of the Act.

[14] See article on "The Government and the Soldier's Family," by

Compensation for death or disability is provided by Article III of the Act. From the point of view of our study, this is the most important of the various subdivisions of the general plan, and the analogy to workmen's compensation is very close. The public in this case is the ultimate consumer who profits by the soldier's activities in his dangerous occupation; and so the public pays, in the form of taxes, the money necessary to assure compensation to the disabled and to the dependents of the slain, just as, under the normal workmen's compensation act, the ultimate financial responsibility is shouldered by the consumer in the form of increased cost of the article he buys.

Death and disability "resulting from personal injury suffered or disease contracted in the line of duty" are made the subject of compensation to be paid by the United States; but where the victim's affliction was caused by his own willful misconduct, compensation is denied. The schedule of monthly payments, where death results from the injury, is as follows: for a widow, $25; for a widow and one child, $35; for a widow and two children, $47.50,

Samuel McCune Lindsay, in Review of Reviews for April, 1918, for an excellent discussion of the system of allotments and allowances under the Act. See also article by Paul H. Douglas in 24 Journ. of Pol. Econ., pp. 461–483 (May, 1918).

with $5 for each additional child up to two; for one child alone, $20; for two children, $30; for three children, $40, with $5 for each additional child up to two; for a widowed mother, $20, with the limitations that such payment, when added to the total amount payable to widow and children, shall not exceed $75, and that such payment can be made for the death of one child only and not made at all if such widowed mother is already in receipt of compensation for the death of her husband.[15]

Payment of compensation to a widow or widowed mother under the schedule just described is until death or remarriage; payment to children is to cease on attainment of the age of eighteen years or marriage, unless the child is permanently helpless owing to idiocy, insanity or other cause. As between a widow and children not in her custody, and as between children, the amount of the compensation is to be apportioned as prescribed by regulations; "widow" as used in this section being defined not to include one who shall have married the deceased later than ten years after the time of injury. Where any compensation payable under this section is terminated by the happening of the contingency upon which it is limited, the amount to be

[15] Secs. 300, 301 of the Act.

paid to remaining beneficiaries, if any, is to be the same as would have been payable had they been the sole original beneficiaries. Where the deceased's death occurs after discharge or resignation from service, the United States is to pay not in excess of $100 for burial expenses and cost of transportation of the body to his home. Finally, it should be noted that not only "enlisted men" but commissioned officers and female members of the Army and Navy Nurse Corps on active service, are entitled to the benefits of this and the other sections of the Act dealing with compensation for death and disability.[16]

The schedule of payments, in cases where total disability results from the injury, is as follows: if the injured man has neither wife nor child living, $30 per month; if he has a wife but no child, $45; a wife and one child, $55; a wife and two children, $65; a wife and three or more children, $75; no wife but one child, $40, with $10 a month for each additional child up to two; if a widowed mother dependent on him for support, $10 in addition to the above amounts. Where the injured man is so helpless as to be in constant need of a nurse or attendant, such additional sum up to $20 a month

[16] Ibid.

shall be paid as the director shall deem reasonable; but if there has been a loss of both feet or both hands or both eyes, or the injured man has become totally blind or helplessly and permanently bedridden from causes occurring in the line of duty of the service of the United States, compensation is to be at the rate of $100 per month, without allowance for nurse or attendant.[17]

Cases of partial disability are compensated by a percentage of the amount that would be payable for total disability, equal to the degree of the reduction in earning capacity resulting from the injury; but no compensation is to be paid for a reduction in earning power rated at less than ten per cent. In this connection, the Bureau is charged with the duty of making out a schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature. Such ratings may be as high as 100 per cent; and are to be based as far as possible upon the average impairments of earning capacity resulting from similar injuries in civil occupations and not upon the impairment of earning capacity in each individual case, so that, in the words of the Act, "there shall be no reduction in the rate of compensation for individual

[17] Sec. 302 (1) of the Act.

success in overcoming the handicap of a permanent injury." [18] This latter provision, apparently inserted as a safeguard against malingering, also serves to emphasize the fact that compensation under this statute is to be claimed as a matter of right, and not as ill-disguised charity.

In addition to the compensation which we have described, reasonable medical, surgical and hospital services are to be furnished by the United States to the injured person; and such artificial limbs, trusses, and similar appliances as the director may deem useful and reasonably necessary, will be provided in proper cases. It is required, however, that every applicant for compensation shall submit himself to physical examination whenever requested to do so by the authorities; and failure to present himself for or any attempt to obstruct such examination will be penalized by the suspension of awards. Applicants must also submit to any reasonable medical or surgical treatment furnished by the Bureau at the Bureau's request; and the consequences of unreasonable failure so to do are not to be deemed to result from the injury for which compensation is awarded.[19]

The class of cases in which it is expressly provided

[18] Sec. 302 (2) of the Act. [19] Secs. 302, 303 of the Act.

that no compensation shall be payable, is large and is covered by several sections of the Act. Thus, for death inflicted (otherwise than by the enemy) as a lawful punishment for a crime or military offense, no award is made.[20] A dismissal or dishonorable or bad conduct discharge bars recovery of compensation.[21] Where death in the service is not officially recorded in the department under which the deceased was serving, no award will be made; and this operates to bar payments for a period during which the man was reported "missing" and a family allowance was paid for him.[22] Where death or disability does not occur prior to or within one year after discharge or resignation from the service, no compensation is payable; except that, where a medical examination, made pursuant to regulations at the time of discharge or resignation or within a reasonable time not in excess of one year thereafter, results in the issuance of a certificate by the director to the effect that the injured person on discharge or resignation was suffering from injury likely to result in death or disability, compensation for death or disability actually so resulting will be paid.[23]

A sort of statute of limitations is created by the

[20] Sec. 308 of the Act.
[21] Ibid.
[22] Sec. 307 of the Act.
[23] Sec. 306 of the Act.

section of the Act providing that no awards will be made unless claim therefor is filed within five years from resignation or discharge from or death in the service, with the exception that, in the case of compensable death or disability occurring subsequent to resignation or discharge, the five years is to run from the commencement of such disability or the occurrence of such death. The director, however, may extend these periods for not more than one year, in his discretion; and where the claimant is a minor or of unsound mind or physically unable to make a claim, the five-year period dates from the termination of such disability.[24] Compensation is never to be paid for a term greater than two years prior to the claim, nor will increases be awarded to revert back more than one year prior thereto.[25] The power of the Bureau at any time to review awards, and to terminate, diminish, or increase them, or grant compensation where it has been refused or discontinued, is practically unlimited.[26]

Certain other of the provisions of this part of the Act must be briefly stated. Compensation is not assignable, and is exempt from attachment, execu-

[24] Sec. 309 of the Act.
[25] Sec. 310 of the Act.
[26] Sec. 305 of the Act.

tion and all taxation.[27] Awards will not be made while a person is in receipt of service or retirement pay, and existing laws providing for pensions, gratuities, or payments in the event of death, are to have no prospective operation.[28] Compensation under this Act for disability or death of women in the Army or Navy Nurse Corps is to be in lieu of payments under the Federal Workmen's Compensation Law.[29] Where injury or death of one entitled to be a beneficiary under this Act is so caused as to create a liability in some party other than the United States or the enemy to answer in damages therefor, the beneficiary must assign his claim to the United States, to be prosecuted or compromised by the director and the money placed to the credit of the compensation fund.[30] A pension for widows of veterans of former wars is provided.[30a]

One feature on which we have not yet touched, despite its close relationship to the compensation provisions, is the section providing for vocational training and rehabilitation. Of all the many wise and fore-thoughted ideas embodied in the Soldiers' and Sailors' Insurance Act, this is perhaps the most remarkable. It states, in substance, that in cases

[27] Sec. 311 of the Act.
[28] Sec. 312 of the Act.
[29] Ibid.
[30] Sec. 313 of the Act.
[30a] Sec. 314 of the Act.

of dismemberment, loss of sight or hearing, or other injury causing permanent disability, the injured person is to follow such course of "rehabilitation, reëducation, and vocational training as the United States may provide or procure to be provided." Where taking such a course prevents the injured man from earning his living meanwhile, he may be brought back into the military or naval service under a form of enlistment which entitles him to full pay as of the last month of his active service, and his family to corresponding allotments and allowances, in lieu of all other compensation. Where there is willful failure to follow the course prescribed or to enlist, compensation payments are to be suspended until such willful failure ceases, and no awards will be made for the intervening period.[31]

At the present writing, Congress is being besieged with proposed amendments to this section, designed to place the administration of its provisions under the Federal Board for Vocational Education or other body, or to insert some new requirement, limitation or benefit.[32] By the time this book

[31] Sec. 304 of the Act.

[32] As this goes to press, news comes of the passage of an act to place vocational rehabilitation under the Federal Board for Vocational Education. Public, No. 178, 65th Congress (approved June 27, 1918). See comment in The Vocational Summary, vol. 1, No. 2 (June, 1918).

emerges from the press substantial changes will undoubtedly have been wrought in the administrative features of the scheme; but it may be asserted with confidence that no less intelligent and humane plan will be substituted, if the public is given a fair chance to judge of the far-sightedness as well as beneficence of this bit of modern social legislation.

The world is already so familiar with the extensive work being done in England in training the blind and other war cripples that the mere introduction into this country of like salutary measures to deal with the problem of the disabled is no cause for surprise. We have, however, reason for self-congratulation in the promptness with which the unfortunate contingency was foreseen, and, above all, with the centralized control of relief and educative measures which the Soldiers' and Sailors' Insurance Act has introduced. If the problem of rehabilitation were left to irresponsible private agencies, no matter how philanthropic and well-meaning, inequality and inefficiency would have been sure to follow. Moreover, the problem of the disabled of a war is a national problem, if there ever was one; and it is to the public interest that full control over the administration of the measures undertaken for its solution should be lodged in the central

government. As a people, we must work out our salvation together, shouldering alike the financial burdens and the responsibility for success.

Some of the reasons for the need of vocational reëducation for disabled soldiers and sailors are outlined in a recent periodical. Such training is said to be required to insure the economic independence of these men; to conserve trade skill; to insure national rehabilitation; to avoid vocational regeneration, or lapse into a state of chronic dependence and lack of ambition; to prevent exploitation of these unfortunates by the unscrupulous; to adjust the supply of labor to the demand; to develop new vocational efficiency.[33] All these purposes are best promoted by a highly centralized administration, which can determine the precise needs of industry for skilled labor, and then undertake to fill those needs by training the proper number of men to do the sort of work required. Centralization we will have under the wise provision of our Act, which leaves the problem, as it should be left, in the hands of the Federal Government.

We have already described the provisions for allotments and allowances, compensation, and vocational education, contained in the Act with which

[33] The Vocational Summary, vol. I, no. 1, p. 5 (May, 1918).

this chapter deals. There remains the feature which has attracted the most widespread attention —a scheme for voluntary insurance of men and women in the active military and naval service at ordinary peace time rates, in an institution operated and financed by the Government. It is the most gigantic experiment in state insurance yet attempted, and one of the boldest; for the United States practically carries the entire additional war risk by way of gift to those who are fighting its battles.

Like all social legislation, the insurance scheme of our Act has two aspects: the philanthropic and the practical. It has been the custom of writers, rather unfortunately I believe, to harp upon the insolvency of War Risk Insurance, and to advance the doctrine that it is only right and proper for a nation in time of war to scorn the dictates of business judgment and heap benefits upon those who fight to preserve it, regardless of cost.[34] Whether or not it is ever desirable for governments to be so purely sentimental, it seems clear that the United States was actuated by more practical motives when it instituted the scheme of insurance for its war-

[34] See American Economic Review, vol. VII, p. 202 (March, 1918). Here Mr. Gephart seems to be invoking patriotism and philanthropy to excuse business defects.

riors now under discussion. That scheme in operation is a measure of justice to the dependents of those who die in the service; but justice, like honesty, is often also the best policy, and the United States does not stand to lose by the generous opportunities it offers to its soldiers and sailors to insure themselves at low rates. It is true that the premiums collected will in all probability be wholly insufficient to defray the sums that must be paid out in claims and for overhead; but it should not be forgotten that the voluntary insurance offered by the United States is intended in large degree to be in lieu of pensions. If the completely disabled soldier, and the widow and dependents of him who died in service, can be removed from the pension lists by reason of the provision made in their behalf through insurance, an enormous financial burden will be lifted from the Government, enough to compensate at least in part for the losses it will incur in conducting War Risk Insurance as a business. The insured at least pays premiums; the pensioner does not. In the long run the Government should be the gainer. If a grateful posterity, not satisfied with a system which will have made the families of veterans of the Great War secure from want, insists on pensioning them lavishly nevertheless, War Risk

Insurance will have failed in its purpose of preventing a repetition of the scandalous expenditure and irrational distribution of favors which have made the name of "pension" odious in our time; but this, like other economic problems projected into the future, must be left for its solution to the wisdom and sense of justice of the coming generation. We will have laid at least a sound foundation, according to our lights.

The insurance provisions of our Act are contained in Sections 400 to 404, inclusive. It is first provided that in order to give to all commissioned officers and enlisted men and to female members of the Army and Navy Nurse Corps employed in active service "greater protection for themselves and their dependents than is provided in Article III" (the compensation article), the United States, "upon application to the bureau and without medical examination" will grant insurance against death or total permanent disability in any multiple of $500, but not less than $1,000 or more than $10,000, upon payment of the prescribed premiums.[35] Insurance must be applied for within 120 days after enlistment or entrance into and employment in the active service and before discharge or resignation;

[35] Sec. 400 of the Act.

except that "those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance," and remain so, may apply at any time within 120 days thereafter.[36] Automatic coverage of a sort is provided for those persons in the service on or after April 6, 1917, who become or have become totally and permanently disabled or die within 120 days after publication as stated above, without having made the proper application. Such a person is deemed to have applied for and been granted insurance, and payments of $25 per month are to be made to him during life, or in case of death before receiving any or as many as two hundred and forty of such installments, to his wife from the time of his death and during her widowhood, or to his child, or widowed mother while they survive him. In no case, however, are more than two hundred and forty monthly installments to be paid.[37]

The peculiar features of the war risk insurance policy are set forth with some particularity in Section 402 of the Act. The director, subject to the general supervision of the Secretary of the Treasury, is allowed wide latitude in settling the exact terms and conditions of the contract. The insur-

[36] Sec. 401 of the Act. [37] Ibid.

ance is not assignable, nor subject to the claims of the creditors either of the insured or the beneficiary. It is payable only to a spouse, child, grandchild, brother or sister, or to the insured during total and permanent disability. Ordinarily it will be paid in two hundred and forty monthly installments; but provisions for maturity at certain ages, continuous installments during the life of the insured or the beneficiaries, for cash, loan, paid up and extended values, and other provisions proving reasonable and practicable, may be provided for in the contract, or from time to time by regulations. Where there is no surviving duly designated beneficiary within the permitted class, the money is to be distributed among such members of that class as would be entitled to the deceased's personal property under the laws of intestacy; and if no such person survive the insured, the latter's estate is to be credited with the amount of the reserve value of the insurance at the time of his death, calculated in the manner already provided for.

As we have already stated in these pages, the excess mortality and disability cost resulting from the hazards of war is to be borne by the United States; and the same is true of the expenses of administration. This result is assured by the iron-

bound provision that the premium rates charged are to be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per cent.[38]

One of the most bitterly criticized provisions of the whole Act is that which permits the continuance after the war of the policies taken out during the period of hostilities. Many who loyally support the Government's interference in private business as an emergency measure are bitter against what they deem to be the first step towards the permanent establishment of state-managed life insurance.[39] The much-debated Section provides, in a few words, that during the war, and thereafter until converted, policies shall be term insurance for successive terms of one year each; but, not less than five years after the end of the war, this insurance is to be converted, without medical examination, into such form or forms as the insured may request and regulations may prescribe. These regulations, moreover, must provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and other

[38] Sec. 403 of the Act.

[39] See, for instance, the outraged protest of Arthur Richmond Marsh, in The Economic World, New Series, vol. XV, p. 344 (Mar. 9, 1918).

usual forms, and shall prescribe the time and method of payment of premiums; but advance payments are not to be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or otherwise made at his election.[40]

Enforcement by suit, in case of disagreement between the bureau and any beneficiary or beneficiaries as to a claim under one of these war risk insurance contracts, was provided for by Section 405 of the Act as originally passed. This section was repealed by a law of May 20, 1918, which substituted an amendment to Section 13 of the Act as originally passed, materially limiting the amount of compensation which attorneys and claim agents may receive. The new provision restricts the fee which may be charged for assisting a claimant in the preparation of his papers to three dollars; and when the applicant and the bureau disagree on the amount payable, and suit is brought in the United States District Court, the former's attorney cannot claim more than 5% of the amount recovered. The asking or receiving of any other compensation in respect to the action by the attorney or claim

[40] Sec. 404 of the Act.

agent is not only made unlawful, but those who secure or attempt to secure fees not prescribed are liable to a $500 fine or two years' imprisonment, or both.[40a]

Some of the controversies to which Soldiers' and Sailors' Insurance has already given rise have been adverted to. The fear often expressed, that the new scheme is the entering wedge of Government monopoly of the entire insurance business, may or may not be well founded; but the great and obvious desirability of having the policy taken out in war time form the basis of a permanent provision for that future which service in the armed forces renders especially uncertain because of present or potential disabilities acquired, has very properly overridden the objections of selfish conservatism. It has been suggested that free coverage of all up to a certain sum would not only have been in keeping with the liberal policy of the Government, but would more surely render unnecessary a resort to pensions after the war, by taking care of the rare instance where a soldier or sailor refuses to insure himself.[41] The answer to this criticism is

[40a] Public, No. 151, 65th Congress (May 20, 1918).

[41] Such a suggestion was made, it seems, by the life underwriters of the country. The Weekly Underwriter, vol. XCVIII, p. 34 (Jan. 12, 1918).

twofold: first, the number of Army and Navy men who have not taken out policies is negligible:[42] and secondly, these unusual cases may be provided for, at least in part, by the power given to the Secretaries of War and of the Navy to compel the deposit to the enlisted man's credit of such portions of one-half of his pay as are not expended in allotments.[43]

The Act as originally drawn contemplated applications for insurance only by the insured. This meant that the purpose of the whole scheme could be defeated, so far as the individual case was concerned, by the selfishness of a soldier who preferred a little extra spending money to the righteous satisfaction of leaving his family well provided for in case of his death. This defect in the law was early seized upon by the critics; and Congress has now amended the original statute to permit of persons other than the insured applying for policies.[44] The beneficiaries remain restricted as before; and the

[42] According to figures issued in March by the Secretary of the Treasury, over 90 per cent of the United States Army, here and abroad, have taken out insurance with the bureau. Official Bulletin, Mar. 18, 1918.

[43] See Sec. 203 of the Act.

[44] See Weekly Underwriter, vol. XCVIII, p. 381 (March 23, 1918), for editorial comment on the change effected in the Act by the Amendment, the increase in the number of policies which will result, and the opportunity for patriotic service on the part of life insurance men in aiding the scheme as expanded.

amendment takes its place as a worthy part of the general plan to provide so generously for fighting men and their families as to render extensive pension legislation unnecessary.

CHAPTER IX

REQUISITES OF THE IDEAL LAW

THE many disadvantages of our state system, with the grotesque discrepancies between the fundamentals and commonplaces alike of the law of adjoining jurisdictions to which it gives rise, are sufficiently obvious. But when legislation of a new type is afoot, our little commonwealths within a great commonwealth furnish an ideal stamping-ground, an experimental field where all the variations and modifications of the novel principle can be tried and studied, with a view to determining the ideal form which such legislation should take. These experiments are costly, but, if conducted and compared with intelligence, will help to substitute for guesswork something like scientific accuracy.

This country has now witnessed nearly eight years of experiments in workmen's compensation. In that time, almost every conceivable variation of the principle has been attempted, from elective compensation acts applicable to a few employments

to compulsory state insurance laws covering practically all. The desire for uniformity, and more particularly for uniform accuracy is keenly felt;[1] and now that our legislators have had the benefit of several years of American and many of foreign experience, it would seem that they should be in a position to gratify it.

That admirable body of public-spirited men, the Commissioners on Uniform State Laws, have undertaken to draft a Uniform Workmen's Compensation act, the adoption of which they have urged on all the states, and which was enacted into law in 1915 in the Territory of Hawaii, and, with some modifications, in Vermont.[2] The plan provides for compulsory compensation, with either insurance or security, but with no State insurance. As so outlined, I do not wholly agree to it, and in the following pages I will endeavor to indicate what I conceive to be the requisites of an ideally adequate and comprehensive law which might be enacted in all jurisdictions throughout the United States.

The model statute should, first of all, be compulsory. At this stage of the development of the com-

[1] W. C. Fisher in Amer. Economic Review, vol. V, p. 226 (June, 1915).

[2] Hawaii Acts 1915, No. 221; Vt. Acts 1915, c. 164, as amended by Acts 1917, c. 171, 173, 176.

pensation principle, it is almost universally conceded that such laws should be compulsory, and that the only reason for making them elective in form has been to avoid possible constitutional objections.[3] As we have seen, state legislatures imbued with the spirit of progress, but restrained by a craven fear of having their enactments overthrown by the courts, have endeavored, by raising presumptions of acceptance and by other means, to make nominally elective laws compulsory in fact; these are disgraceful subterfuges, and inexcusable in this day and age. If constitutional provisions are so antiquated or inelastic as to stand in the way of needed labor legislation, they should go; the path of amendment is open to all, and has been availed of in many states. The elective method is needlessly complicated and cumbersome in operation; compulsory laws are simpler, more intelligible, less expensive to administer, and more just because more uniform and certain.

The field of compensation should be as broad as possible. It is hard to see on what principle the exception of any employment in which an industrial accident may happen can be supported. Certainly

[3] Lewis C. Williams in Case and Comment, vol. 22, p. 296 (September, 1915).

the restriction of a compensation statute to "extra-hazardous" employments has no foundation in reason; for the workman who is injured by a rare accident suffers just as much, and he and his dependents are as likely to become a charge on the community, as one who falls a prey to a more common mishap. There was an economic reason, to be sure, for the early restriction of compensation to extra-hazardous employments, for it was there that the pressure of resulting poverty first began to be felt; but from the beginning this was a compromise, and it is one which can hardly be defended now.

Various state statutes have excluded casual workers, outworkers, public employees, and those drawing a salary of more than a certain amount a year. These restrictions, too, are illogical and often unjust. In the case of Joseph C. Gaynor, referred to elsewhere in this volume, the widow of a waiter who was killed by an accident arising out of and in the course of his employment, was not permitted to recover compensation under the Massachusetts statute because he was technically a casual employee, hired by the job, though his employer always engaged him that way.[4] This result was cruelly unjust; but such a situation is not uncom-

[4] Joseph C. Gaynor's Case, 217 Mass. 86.

mon where the rule as to casual employees is in effect.

Outworkers—those who do the employer's work in their own homes, such as laundresses,—are not covered by many of our statutes. This exclusion "implies a retention of some part of the old doctrine of liability as conditioned upon personal fault," [5] and is indefensible in a workman's compensation law. Distinctions on the basis of earnings fail to meet with the approval of those of us who believe that compensation awards are part of the just return for services rendered; the fact that a man is making a comfortable salary before injury will make his case less imperative than that of a laborer barely able to live on his wages, but it should not deprive him of his right under an adequate law. Public employees should be included, since the public ought to be a model employer.[6] And the exclusion of those not serving in the master's trade or business—a class embracing college professors, ministers, men engaged to do interior decorating or some such service of luxury for a private householder—needs but to be mentioned to be shown arbitrary and absurd. In short, I am fully con-

[5] W. C. Fisher in Amer. Economic Review, vol. V, p. 242 (June, 1915).

[6] Ibid., p. 240.

vinced that only a law covering all employments, for what purpose soever, will give permanent satisfaction.[6a]

The injuries covered should be all those directly or indirectly due to the employment. This should include the entire field of industrial accidents so-called, and in addition disease traceable to the nature of the occupation. I am not prepared to say that we should go the whole length of the German plan in compelling insurance against all sickness, invalidity and old age. Such a measure, passed by Congress and applicable not merely to employees but to the entire population, might be one way of eradicating the "deserving poor"; but I do not think it advisable or just to lay upon employers the burden of supporting victims of all mortal ills simply because they happen to be employees.

Conditions of forfeiture present a perplexing question. On the one hand, we have the settled principle that under workmen's compensation laws negligence of the employee is immaterial; and on the other, the apparent injustice of mulcting the employer where that negligence was gross and inexcusable. Practical considerations, however, de-

[6a] "A perfect scheme of compensation should cover all employments without exception." Blanchard, Liability and Compensation Insurance, p. 109.

termine the matter in favor of awarding compensation even in such cases; for gross carelessness on the part of the workman where his own safety is concerned is so exceptional as not to constitute a serious problem; and the litigation in which we would at once be plunged as soon as we began to consider degrees of negligence would defeat one of the principal aims of the compensation system—to diminish the cost of determining questions of liability for industrial injuries.

Clearly, however, the ideal law would not permit a workman to recover from his employer for self-inflicted injuries. Pity for the man's family and dependents may be aroused in such a case; but I am afraid that in an instance of this sort they must be left to suffer. Examples of this kind of depravity among workingmen are fortunately rare; but to encourage it by granting compensation in such cases is unthinkable, either from an economic or a moral point of view. The tribunal administering the law should insist, of course, that proof of the self-infliction of an injury should be clear and unequivocal.

Considerations of public policy are not so imperative, however, in the case of intoxication. So long as the law sees fit to permit the sale of liquor in

public-houses, workingmen will be subjected to what is commonly called temptation, but which is more often infection. For alcoholism is a disease, and those especially susceptible to it are more to be pitied than scorned. Excluding intoxicated workmen from compensation benefits might have some slight effect in diminishing drunkenness, though it is a very indirect and uncertain way of accomplishing that end; but on the other hand it would work some hardship on the weak but not vicious drinker, and a very great injustice on his helpless dependents. On the whole, I think intoxication of the injured workman should not operate to bar his claim to compensation; and only for self-inflicted injury should forfeiture be provided.

The purpose of the "waiting period," as has been explained in a previous chapter, is two-fold—to relieve the administration of the compensation act from the burden and confusion of payments for trifling injuries, and to discourage malingering.[7] But if the interval is a long one, a laborer and his dependents are apt to be thrown in the meantime into the extremes of poverty, and are sometimes forced to accept charity to keep from starvation.

[7] Amer. Labor Legislation Review, vol. V, no. 1, Publication 28, at p. 76 (March, 1915).

So the ideal law would provide for the shortest waiting period consistent with the accomplishment of the purposes mentioned. Two weeks, the commonest period in our states, is too long; I would set it at not more than three or four days.[7a] If the laborer is disabled longer than that, he should be permitted to claim compensation from the date of the injury.

After much consideration, and changing my mind more than once, I have come to the conclusion that the ideal law should provide for a state insurance fund, in which employers should be forced to insure. It is in the interest of the public that useful business concerns should remain solvent; and the temptation to which the individual employer is subjected, where insurance is not compulsory, to take a gambler's chance and avoid the payment of the premiums, is conducive to unsound financial conditions. "But why not insurance in private companies?"—it may be asked. Because centralization means cheaper and more efficient management;

7a "The waiting period in all cases should be reduced from fourteen days to four days." McCanna, The New Era, p. 83. Where the waiting period is two weeks, with full payment from date of injury if the disability lasts that long, the temptation of an employee only slightly injured to malinger and prolong the disability is tremendous. See, on this point, Blanchard, Liability and Compensation Insurance, p. 115.

because stability is essential, and it is better assured by having the state back up the plan than by leaving it to private concerns; because the lower the premiums, consistent with safety, the better for the parties and the public, and insuring with the state eliminates the element of private profit; because the whole matter is a public affair, of which the people, through their elected representatives, should have the ultimate management.

At what rates should payments be made under the ideal law? In the case of total disability, the rate should be substantial but not too high. Where full wages are paid, experience has shown that voluntary idleness and malingering are encouraged.[8] Probably two-thirds or 66⅔% of the average weekly earnings is sufficient; where wages are very low, there should be a minimum payment graded according to the number of dependents.

Where disability is partial, the problem is more difficult. The original idea was to estimate payments on the basis of the decrease of earning capacity. This is an excellent scheme when the partial disability is only temporary; but where it is permanent that solution is not so satisfactory. Loss of an

[8] Lindley D. Clark in Journal of Political Economy, vol. XXIII, p. 809 (October, 1915).

eye, for instance, may not very seriously impair the present earning capacity of a section-hand; but it may make him incapable of ever being promoted to brakeman. In other words, the prospective effect of an injury should be taken into account in making awards.

Perhaps the least satisfactory way of graduating awards is by the flat rate schedule. So many dollars for a right arm, so many dollars for a broken rib—the sound of it is disgustingly commercial, and the results are very far from just. Yet to make such payments *in addition to* the sums estimated on the basis of loss of earning power, present and prospective, is perhaps to approximate justice more closely than by any other method. For disfigurement, too, though unaccompanied by physical disability, compensation should be given, both because of the real suffering and inconvenience caused, and because disfigurement almost invariably has an unfavorable influence on earning capacity.

Death benefits should be higher, in the writer's opinion, than they are at present; and they should not be the same regardless of the number of dependents, as they are in too many states. The New York system commends itself most favorably to me, with its percentage to the widow, so much

more for each minor child, etc. But the total should not be restricted, as in that state, to two-thirds of the average earnings and not to exceed a certain lump sum. The ideal law would give only burial expenses, if there were no dependents; in the case of minor children, payments until they attained full age; where there is a widow, a life pension; and the total of payments, if there are enough dependents, might equal the full wages of the deceased. In this way, there would be no substantial increase in the gross amount paid as compensation, since in the many cases in which the deceased was without a family or with only one or two immediate relatives, the disbursements would actually be diminished; yet where the dependents were many, something approaching adequate compensation would be assured.

One other requisite of the ideal law must be mentioned before we close. That is adequate provision for prompt and effective administration. In a few states, this matter is left to the courts; but, as might have been expected, this has proven very unsatisfactory.[9] Industrial commissions have undertaken

[9] See article entitled "Three years under the New Jersey Workmen's Compensation Law" in the American Labor Legislation Review, vol. V, no. 1, Publication 28, pages 36–102, for a withering denunciation of the method of administration by the courts.

the task in other jurisdictions, deriving their powers from various sources; and a power of general supervision is sometimes given to the state Insurance Commissioner.

An Insurance Board appointed by the Governor, subject to certain restrictions, appeals to me as the body best qualified to administer the ideal statute. Such a board's personnel would be limited to practical actuaries, lawyers and others with special experience in insurance matters, physicians, and perhaps one representative each from the labor unions and the employers. Sittings should be frequent in all towns of the state; and before the board should be brought not only cases arising in such towns, but also the evidence collected by traveling agents in outlying districts. In order to induce the prompt settlement of all claims before such agents without the necessity of appeal to the board, costs should be collected from all employers who refuse to abide by the decision of the local agent and appeal unsuccessfully; similarly, employees appealing without success for increase of compensation would be mulcted, though they should be permitted to be heard before the board without penalty in case no award at all was made in their favor at the original hearing.

The suggestions made in this chapter have been based on some study of the laws now in force in Europe and America; but it would be folly to pretend that ultimate wisdom on the subject of workmen's compensation, so spectacular in its past development and so fruitful of possibilities for the future, can ever be confined within the limits of a rigid formula. Of one proposition, however, the writer is firmly convinced, despite some indications to the contrary; the American states, sooner or later, will be driven or persuaded to adopt compulsory state insurance laws as the only satisfactory solution of the problem of compensation to injured workingmen.

BIBLIOGRAPHY

Note: No attempt has been made in the following pages to give anything like an exhaustive bibliography of the subject of Workmen's Compensation and Employers' Liability. Such an undertaking would result in filling two or three volumes at least; even the Select List of References published by the Government Printing Office of the United States in 1911, before the avalanche of literature on the subject in this country began, is 196 pages in length. This Bibliography, therefore, refers only to the most important books, magazine articles, etc., which have proved useful in the preparation of the present work.

SOURCES

These are too many and varied to be listed here. They consist of statutes, reported cases, reports of state commissions on Workmen's Compensation and Employers' Liability, reports of various bodies such as the American Federation of Labor which have discussed the subject with which we are deal-

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